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Docket Entries
CIVIL DOCKET
UNITED STATES DISTRICT COURT

72 Civ. 2286

DATE

PROCEEDINGS

- May 25-72 FILED COMPLAINT. ISSUED SUMMONS.
- May 31-72 Filed Notice of Motion. Re: 3 Judge Court ret. 6/6/72.
- Jun 13-72 Filed Geraldine M. Boylan, et al Notice of Motion. Re: Intervene Ref. 6/20/72.
- Jun 13-72 Filed Memorandum of Law of Geraldine M. Boylan, et al in support of Motion to Intervene.
- Jun 22-72 Filed ORDER that Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr. and Adamina Ruiz are granted leave to intervene as pty. defendants.; ordered that the proposed Answer of intervenor-defendants served on all other parties to this action be filed with this Clerk of Court, as the answer of said intervenor-defendants to pltf's. complaint; the caption to be amended as indicated. Gurfein, J. (mailed notice).
- Jun 22-72 Filed Designation of Judges. In addition to the Hon. Murray I. Gurfein, to hear and determine this cause, the following judges are designated: Hon. Paul R. Hays, U.S.C.J.,

Docket Entries

DATE	PROCEEDINGS
	U.S.C.A.; and Hon. John M. Cannella, U.S. D.J., USDC, SDNY. Friendly, Ch. J. U.S. C.A. Second Circuit. (mailed notice) (Also in 72 Civ. 2493).
Jun 23-72	Filed defts ANSWER to complaint
Jun 28 72	Filed Order Ordered Senator E W Brydges has leave to intervene in this cause and is made party and file answer in the same manner as if named original party in this cause Gurfein J (mailed notice)
Jul 3-72	Filed Plaintiffs' Brief.
Jul 6.72	Filed Brief on behalf of dfts. Nyquist, Levitt & Gallman.
JUL 6 72	Before: Hays, J., Cannella, J., Gurfein, J.—Hearing held—Decision Reserved.
JUL 12 72	Filed Pltffs' suppl. brief.
June 20 72	Filed Summons & entered Marshal's return—Served Ewald B Nyquist on 6-6-72.
JUL 14 72	Filed Reply brief for intervenor-Defts Boylan, Cherry, Ducey, Ferguson, Farrarella, Roos and Ruiz.
JUL 14 72	Filed ANSWER of Intervenor-Deft Senator Earl W Brydges
JUL 21 72	Filed PER CURIAM by Hays, CJ., Cannella, J., Gurfein J. "The motion for a declaratory judgment and to enjoin the implementation

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of Sec. 1 of Chapter 414 of the laws of NY 1972 is granted in favor of the pltff. Decision Reserved on the other matters in suit. Submit order, on five days notice. So Ordered."

SEPT 8 72 Filed Transcript of the record of proceedings dtd 6-20-72.

SEPT 8 72 [Filed Transcript of the record of proceedings dtd] 7-6-72.

Oct. 2-72 [Filed Transcript of the record of proceedings dtd] 7-6-72.

Oct. 2-72 Filed brief of Intervenor-Deft.

Oct. 2-72 Filed Brief for Intervenor-deft's. Boylan, Cherry, Ducey, Ferguson, Ferrarella, Roos & Ruiz.

Oct. 2-72 Filed pltff's memorandum of law in support of his motion to convene a three-judge court. (Filed in court on 6-20-72.)

Oct. 2-72 Filed brief on behalf of deft. Nyquist, Levitt & Gallman.

Oct. 2-72 Filed pltff's supplemental brief

Oct. 2-72 Filed pltff's brief.

Oct. 2-72 Filed OPINION #38804: A permanent injunction will be issued against, the enforcement of Sections 1 & 2 of the statute. Judgment will be, entered accordingly, pursuant to fed. R. Civ p. 54 (b). A permanent, in-

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junction against enforcement of section 3 of the statute will be, denied. The complaint so far as it relates to Section 3 of the, statute, will not be dismissed, however. The parties may move for, summary judgment or for an expedited trial. An order will be, settled on notice. The foregoing shall constitute the courts, Findings of fact & conclusions of law pursuant to fed. R. Civ. P. 52(a). Hays, J. U.S.C.J., Cannella, J. & Gurfein, J. Mailed notice.

- Oct. 10-72 Filed ORDER amending opinion filed Oct. 2, 1972, by deleting the word "plurality" in the first line of the last paragraph on page 12. Hays, C.J., Cannella, D.J. and Gurfein, D.J. (mailed notice).
- Oct 17 72 Filed Defts Notice of motion for summary judgment and of settlement of order & Judgment. (summary judgment—to dismiss complaint with respect to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of NY)
- Oct 17 72 Filed Defts memo of law in support of motion filed this day.
- Oct. 20-72 Filed ORDER and JUDGMENT. Ordered that the defendants, their agents, etc. are permanently enjoined as indicated; ordered that defendants' and intervenor-defendants' motion for summary judgment with respect

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to Sections, 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York, is granted; ordered that the complaint, insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the Laws of New York is dismissed. 3 Judges—Hays, C.J., Cannella, D.J., and Gurfein, D.J. Judgment ent. 10/20/72. Ent. 10/25/72. (mailed notice).

- Nov. 3-72 Filed Notice of Appeal to the Supreme Court of the U. S.
- Oct. 27-72 Filed Notice of Appeal to the Supreme Court of the U. S.
- Nov. 8-72 Filed Notice of Appeal to the Supreme Court of U.S. by defts. Ewald B. Nyquist, Arthur Levitt and Norman Gallman.
- Nov. 17-72 Filed Notice of Appeal to the Supreme Court of the United States.
- Jun. 20-72 Filed affidavit in opposition to motion for prelim. Injunction & T.R.O.
- Jun 20-72 Filed (In Court) Order to show cause for leave to intervene. Ret. 6-20-72. Cooper, J.
- Nov. 28-72 Filed Order authorizing transmission of Record. to the Supreme Court of the U.S. Gurfein, J. (mailed notice).
- Jun 20-72 Filed memorandum of law of intervenor-defts. in opposition to plttfs. application for a temporary restraining order. (Filed in Court)

Docket Entries

DATE	PROCEEDINGS
Jan 5-73	Filed notice to the docket clerk that the record on appeal has been certified and transmitted to the U.S. Supreme Court on 1-5-73.
Jan. 29-73	Filed true copy of Supreme Court order. The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allotted for oral argument.

Complaint

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action
72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller
of the State of New York, and NORMAN GALLMAN, as
Commissioner of Taxation and Finance of the State
of New York,

Defendants.

I. STATEMENT AS TO JURISDICTION

1. This is a civil action brought by the plaintiffs, on
their own behalf and on behalf of all others similarly situ-

Complaint

ated, for a temporary and permanent injunction against the allocation and use of the funds of the State of New York to finance the operations of schools owned and controlled by religious organizations and organized for and engaged in the practice, propagation and teaching of religion, and to declare such use violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, United States Code, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand Dollars (\$10,000) as more fully appears hereinafter.

4. Plaintiff COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY (PEARL) is an unincorporated association whose constituent members are: American Ethical Union; Americans for Democratic Action; Americans for Public Schools; American Jewish Committee, New York Chapter; American Jewish Congress; A. Philip Randolph Institute; Association of Reform Rabbis of New York City and Vicinity; B'nai B'rith; Citizens Union of the City of New York; City Club of New York; Community Service Society, Committee on Public Affairs; Council of Churches of the City of New York; Episcopal Diocese of L. I., Department of Christian Social Relations; Humanist Society of Greater New York; Jewish Reconstructionist Foundation; Jewish War Veterans, New York Department; League for Industrial Democracy, New York City Chapter; National Council

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of Jewish Women; National Women's Conference of American Ethical Union; New York Civil Liberties Union; New York Jewish Labor Committee; New York State Americans United for Separation of Church and State; New York State Council of Churches; New York State Federation of Reform Synagogues; State Congress of Parents and Teachers, New York City District; Union of American Hebrew Congregations, New York State Council; Unitarian-Universalist Ministers Association of Metropolitan New York; United Community Centers; United Federation of Teachers; United Parents Associations; United Synagogue of America, New York Metropolitan Region; Women's City Club of New York; and Workmen's Circle, New York Division. The members of these organizations who reside in the State of New York are numerous and the organizational plaintiff and each of its constituent organizations carry on activities in the Southern District of New York. The organizational plaintiff and its constituents share as common objectives preservation of freedom of religion and the separation of church and state and opposition to the use of public funds for the support of sectarian or religious schools.

5. Each of the individual plaintiffs is a citizen of the United States. Each resides in the State of New York, and some reside in the Southern District of New York. Each of them pays income and various other taxes in and to the State of New York. Plaintiffs Bert Adams, Theodore Brooks, Herschel Chanin, Naomi A. Cowen, Blanche Lewis, Aryeh Neier and Albert Shanker have children regularly registered in and attending the elementary or secondary grades in the public schools of New York.

Complaint

6. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and is sued herein in that capacity. Defendant Arthur Levitt is the Comptroller of the State of New York and is sued herein in that capacity. Defendant Norman Gallman is Commissioner of Taxation and Finance of the State of New York and is sued herein in that capacity.

II. FACTUAL ALLEGATIONS

7. On May 22, 1972, Governor Nelson A. Rockefeller signed into law an act, Laws 1972, Chapter 414, entitled, "An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings." (The text of the said Act, hereinafter referred to as the Act, is set forth herein as Appendix A.)

8. The Act on its face and as construed and applied by the defendants authorizes and directs payments to schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and re-

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ligious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

9. The Act on its face and as construed and applied by the defendants authorizes and directs payments of tuition to schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

10. The Act on its face and as construed and applied by the defendants directs and authorizes New York State tax benefits for payments of tuition to schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose

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religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

11. The Act on its face and as construed and applied by the defendants authorizes and directs payment of public moneys to be used for the maintenance and repair of facilities used in whole or in part for sectarian instruction or religious worship.

12. It is against the religious conscience of each of the individual plaintiffs to be forced by the operation of the taxing power to contribute to the propagation of religion in general and to religions to which he does not adhere in particular, or for the support or maintenance of sectarian schools or places of worship.

13. The First Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *."

III. CAUSES OF ACTION

14. *First Count:* The Act on its face and as construed and applied by the defendants, is a law respecting an estab-

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lishment of religion in violation of the First Amendment of the United States Constitution in that it (a) constitutes governmental financing and subsidizing of schools which are controlled by religious bodies, organized for and engaged in the practice, propagation and teaching of religion, and of schools limiting or giving preference in, admission and employment to persons of particular religious faiths; (b) authorizes and directs payment of public moneys to be used for the maintenance and repair of facilities used in whole or in part for sectarian instruction or religious worship; (c) constitutes governmental action whose purpose and primary effect is to advance religion; (d) gives rise to an excessive governmental involvement in and entanglement with religion; and (e) gives rise to and intensifies political fragmentation and divisiveness on religious lines.

15. *Second Count*: The statute on its face and as construed and applied by the defendants, violates the First Amendment to the United States Constitution in that it prohibits the free exercise of religion on the part of the individual plaintiffs by reason of the fact that it constitutes compulsory taxation for the support of religion or religious schools.

IV. OTHER ALLEGATIONS

16. This suit involves a genuine case or controversy between the plaintiffs and defendants.

17. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

Complaint

V. PRAYERS FOR RELIEF

18. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code to declare unconstitutional and enjoin the enforcement of the Act, as hereinbefore set forth.

(2) That the defendants and each of them be enjoined from approving or paying any funds of the State of New York to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith, whether such approval or payment is purported to be made pursuant to the aforesaid statute or otherwise.

(3) That the defendants and each of them be enjoined from approving or paying any funds of the State of New York to be used for payment of or reimbursement for tuition to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith, whether such approval or payment is purported to be made pursuant to the aforesaid statute or otherwise.

(4) That the defendants and each of them be enjoined from according New York State tax benefits for tuition paid to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion

Complaint

or which limit, or give preference in, admission or employment to persons of a particular religious faith, whether such tax benefits are purported to be made pursuant to the aforesaid statute or otherwise.

(5) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief sought herein.

(6) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

May 25, 1972.

/s/ LEO PFEFFER

LEO PFEFFER

Attorney for Plaintiffs

Office and P. O. Address

15 East 84th Street

New York, N. Y. 10028

Tel.: (212) 879-4500

[Verification omitted in printing]

[Appendix A to Complaint, Chapter 414
of the 1972 Laws of New York, printed
in full in Appendixes to Jurisdictional
Statements]

Notice of Motion for Leave to Intervene
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affidavit of Porter R. Chandler, Esq., sworn to June 12, 1972, the annexed Affidavits of Geraldine M. Boylan, Joan M. Ducey and Ernest E. Roos, Jr., sworn to June 9, 1972, the annexed Affidavits of Priscilla L. Cherry, Nora H. Ferguson and Angelina M. Ferrarella, sworn to June 10, 1972, the annexed Affidavit of Adamina Ruiz, sworn to June 12, 1972, and upon all prior pleadings and proceedings herein, Geraldine M. Boylan, 3445 Holland Avenue, Bronx, New York 10467, Priscilla L. Cherry, 660 Willoughby Avenue, Brooklyn, New York 11206, Joan M. Ducey, 3226 Country Club Road, Bronx, New York 10465, Nora H. Ferguson, 238 Linden Boulevard, Brooklyn, New York 11226, Angelina M. Ferrarella, 1945 West 7th Street, Brooklyn, New York 11223, Ernest E. Roos, Jr., 155-19 Jewel Avenue, Flushing, New York 11367 and Adamina Ruiz, 955 Evergreen Avenue, Bronx, New York 10472 will move, on their own behalf and on behalf of all other individuals similarly situated in the State of New York, at a stated motion part to be held at Room 506 of the United States Courthouse, Foley Square, New York, New York on the 20th day of June, 1972 at ten o'clock in the forenoon or as soon thereafter as counsel can be heard for an order:

Notice of Motion for Leave to Intervene

(1) pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure permitting the above individuals to intervene as of right herein as parties defendant and directing that the proposed Answer annexed hereto be filed herein as the answer of the above individuals; or, in the alternative,

(2) pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure permitting the above individuals to intervene by permission of the Court herein as parties defendant and directing that the proposed Answer annexed hereto be filed herein as the answer of the above individuals; and

(3) granting to the above individuals such other and further relief as may be just.

Dated: New York, N. Y.

June 12, 1972

Yours, etc.

DAVIS POLK & WARDWELL

By /s/ PORTER R. CHANDLER
A Member of the Firm

*Attorneys for Geraldine M. Boylan,
Priscilla L. Cherry, Joan M. Ducey,
Nora H. Ferguson, Angelina M.
Ferrarella, Ernest B. Roos, Jr. and
Adamina Ruiz*

1 Chase Manhattan Plaza
New York, New York 10005
Tel.: HA 2-3400

Notice of Motion for Leave to Intervene

To:

LEO PFEFFER, Esq.

Attorney for Plaintiffs

15 East 84th Street

New York, New York 10028

HONORABLE LOUIS J. LEFKOWITZ

Attorney General of the State of New York

Mrs. Jean M. Coon

Assistant Solicitor General

Attorneys for Defendants

80 Centre Street

New York, New York 10007

*Affidavit of Porter R. Chandler in Support of
Motion to Intervene*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

PORTER R. CHANDLER, being duly sworn, says:

1. I am an attorney and member of the bar of this Court and a member of the firm of Davis Polk & Wardwell, attorneys for Geraldine M. Boylan, 3445 Holland Avenue, Bronx, New York 10467, Priscilla L. Cherry, 660 Willoughby Avenue, Brooklyn, New York 11206, Joan M. Ducey, 3226 Country Club Road, Bronx, New York 10465, Nora H. Ferguson, 238 Linden Boulevard, Brooklyn, New York 11226, Angelina M. Ferrarella, 1945 West 7th Street, Brooklyn, New York 11223, Ernest E. Roos, Jr., 155-19 Jewel Avenue, Flushing, New York 11367 and Adamina Ruiz, 955 Evergreen Avenue, Bronx, New York 10472, and I am fully familiar with the facts and circumstances herein. I make this affidavit in support of their motion to intervene as defendants in the above-entitled action pursuant to Rule 24 of the Federal Rules of Civil Procedure.

*Affidavit of Porter R. Chandler in Support of
Motion to Intervene*

2. On May 22, 1972, Governor Rockefeller signed into law an "Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings," [1972] Laws of New York, ch. 414 (the "Act").
3. On May 25, 1972, this action was commenced by the Committee for Public Education and Religious Liberty and 19 individual plaintiffs, all of whom allegedly are citizens of the United States, reside in New York and pay taxes in and to the State of New York. Plaintiffs Adams, Brooks, Chanin, Cowen, Lewis, Neier and Shanker allegedly have children attending New York public schools.
4. The defendants are the Commissioner of Education, the Comptroller and the Commissioner of Taxation and Finance of the State of New York and are sued in those capacities.
5. The specific relief requested in the complaint is "(1) [t]hat a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code to declare unconstitutional and enjoin the enforcement of the Act, as hereinbefore set forth; (2) [t]hat the defendants

*Affidavit of Porter R. Chandler in Support of
Motion to Intervene*

and each of them be enjoined from approving or paying any funds of the State of New York to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith, whether such approval or payment is purported to be made pursuant to the aforesaid statute or otherwise; (3) [t]hat the defendants and each of them be enjoined from approving or paying any funds of the State of New York to be used for payment of or reimbursement for tuition to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith, whether such approval or payment is purported to be made pursuant to the aforesaid statute or otherwise; (4) [t]hat the defendants and each of them be enjoined from according New York State tax benefits for tuition paid to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith, whether such tax benefits are purported to be made pursuant to the aforesaid statute or otherwise; [and] (5) [t]hat a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief sought herein."

6. Plaintiffs noticed a motion for June 6, 1972 for a temporary restraining order, the convening of a three-

*Affidavit of Porter R. Chandler in Support of
Motion to Intervene*

judge District Court and a preliminary injunction, which motion was adjourned, upon consent, to June 20, 1972.

7. Section 2 of the Act requires the defendant Commissioner of Education to make tuition reimbursement payments to parents of pupils enrolled full-time in nonpublic schools whose New York taxable income is under five thousand dollars and who have paid \$20.00 or more tuition to such schools in a given calendar year.

8. I believe that Priscilla L. Cherry, Nora H. Ferguson and Adamina Ruiz qualify for tuition reimbursement payments pursuant to Section 2 of the Act, commencing after July 1, 1972.

9. Section 5 of the Act entitles an individual to subtract from his federal adjusted gross income, in modifying his New York adjusted gross income, a sliding-scale deduction multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependents in grades one through twelve, provided such individual is allowed an exemption for such dependent under Section 616 of the New York Tax Law, has paid at least \$50.00 for each such dependent in tuition to such nonpublic school, has not claimed a tuition reimbursement payment pursuant to Section 2 of the Act and has a New York adjusted gross income, without the benefit of the foregoing modification, of less than twenty-five thousand dollars.

*Affidavit of Porter R. Chandler in Support of
Motion to Intervene*

10. I believe that Geraldine M. Boylan, Joan M. Ducey, Angelina M. Ferguson and Ernest E. Roos, Jr. are entitled to a modification of their New York adjusted gross incomes pursuant to Section 5 of the Act, commencing on and after January 1, 1973.

11. The interlocutory and final relief plaintiffs seek would prevent the proposed intervenors and numerous other individuals similarly situated throughout the State of New York from exercising their rights under the Act.

12. To my knowledge, the present defendants are not now and will not be direct recipients of benefits conferred by the Act and are not now and will not be members of the class(es) for whose benefit the Act was enacted, so that the interests of the proposed intervenors and numerous other individuals similarly situated throughout the State of New York are not directly represented by the present defendants.

13. The proposed intervenors request to be made defendants in this action in order to represent their own interests and the interests of all those similarly situated.

14. The proposed intervention will not delay or prejudice the adjudication of the rights of the original parties, and the main action and the defenses of the proposed intervenors have common questions of law and fact.

15. I have been in personal contact with plaintiffs' attorney, Leo Pfeffer, Esq. and defendants' attorney, Mrs.

*Affidavit of Porter R. Chandler in Support of
Motion to Intervene*

Jean M. Coon, Assistant Solicitor General of the State of New York, and I have informed them of the proposed intervention herein. They stated to me that they do not and will not oppose the present motion.

16. In accordance with subsection (c) of Rule 24 of the Federal Rules of Civil Procedure, appended hereto as Exhibit A is a proposed pleading setting forth the defenses for which intervention is sought.

WHEREFORE, it is respectfully requested that the motion of Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr. and Adamina Ruiz to intervene as defendants in this action be granted, that they be given leave to assert by motion or otherwise the defenses set forth in the proposed pleading appended hereto as Exhibit A and to take part in all future proceedings in this action and that they be granted such other, further and different relief as to this Court may seem just and proper.

/s/ PORTER R. CHANDLER

Porter R. Chandler

[Jurat omitted in printing]

*Affidavit of Geraldine M. Boylan in Support of
Motion to Intervene*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF BRONX, ss.:

GERALDINE M. BOYLAN, being duly sworn, says:

1. I am a resident and citizen of the State of New York.
2. My address is 3445 Holland Avenue, Bronx, New York 10467.
3. I am the mother of two daughters, Colleen A. Boylan and Maureen P. Boylan, both of whom reside with me and are my "dependents" within the meaning of Section 152 of the Internal Revenue Code.
4. Since September, 1971, my daughter Colleen A. Boylan has been continuously enrolled full-time in the 9th grade at St. Helena High School, 915 Hutchinson River Parkway, Bronx, New York 10465 for which I have paid tuition in the amount of \$50.00 per month.
5. For the last several years, my daughter Maureen P. Boylan has been continuously enrolled full-time in Immaculate Conception school, 754 Gunhill Road, Bronx, New York 10467 for which I have paid tuition in the approximate amount of \$20.00 per month.

*Affidavit of Geraldine M. Boylan in
Support of Motion to Intervene*

6. My husband and I had a New York adjusted gross income of less than twenty-five thousand dollars and a New York taxable income in excess of five thousand dollars for the calendar year 1971.

7. I have been informed by my attorneys, Davis Polk & Wardwell, that Section 5 of Chapter 414 of the 1972 Laws of New York, New York Tax Law §612(j) entitles me to a modification of my New York adjusted gross income for payment of nonpublic school tuition.

8. My attorneys have further informed me that an action, captioned above, has been brought wherein the plaintiffs seek to permanently enjoin the enforcement of Chapter 414 of the 1972 Laws of New York (the "Act").

9. To my knowledge, the present defendants are not now and will not be direct recipients of benefits conferred by the Act now challenged and are not now and will not be members of the class(es) for whose benefit the Act was enacted, and I therefore believe that the defendants will not adequately represent my interests and that I am so situated that I could suffer irreparable harm unless I am permitted to intervene in the action as a party defendant.

WHEREFORE, I respectfully request that my motion to intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure be granted.

/s/ GERALDINE M. BOYLAN

Geraldine M. Boylan

[Jurat omitted in printing]

*Affidavit of Priscilla L. Cherry in
Support of Motion to Intervene*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF KINGS, ss.:

PRISCILLA L. CHERRY, being duly sworn, says:

1. I am a resident and citizen of the State of New York.
2. My address is 660 Willoughby Avenue, Brooklyn, New York 11206.
3. I am the mother of two sons, Reginald Spivey Cherry, age 16, and Anthony R. Cherry, age 15, both of whom reside with me and are my "dependents" within the meaning of Section 152 of the Internal Revenue Code.
4. Since September, 1971, both of my sons have been continuously enrolled in the New Catholic High School, 81 Lewis Avenue, Brooklyn, New York 11206 for which I have paid tuition in the amount of approximately \$500.00.
5. I had a New York taxable income of less than five thousand dollars for the calendar year 1971.
6. I have been informed by my attorneys, Davis Polk & Wardwell, that Section 2 of Chapter 414 of the 1972 Laws of

*Affidavit of Priscilla L. Cherry in
Support of Motion to Intervene*

New York, New York Education Law art. 12-A entitles me to tuition reimbursement payments.

7. My attorneys have further informed me that an action, captioned above, has been brought wherein the plaintiffs seek to permanently enjoin the enforcement of Chapter 414 of the 1972 Laws of New York (the "Act").

8. To my knowledge, the present defendants are not now and will not be direct recipients of benefits conferred by the Act now challenged and are not now and will not be members of the class(es) for whose benefit the Act was enacted, and I therefore believe that the defendants will not adequately represent my interests and that I am so situated that I could suffer irreparable harm unless I am permitted to intervene in the action as a party defendant.

WHEREFORE, I respectfully request that my motion to intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure be granted.

/s/ MRS. PRISCILLA L. CHERRY

Priscilla L. Cherry

[Jurat omitted in printing]

*Affidavit of Joan M. Ducey in Support
of Motion to Intervene*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF BRONX, ss.:

JOAN M. DUCEY, being duly sworn, says:

1. I am a resident and citizen of the State of New York.
2. My address is 3226 Country Club Road, Bronx, New York 10465.
3. I am the mother of a son, Stephen G. Ducey, age 15, and a daughter, Carol A. Ducey, age 13, both of whom reside with me and are my "dependents" within the meaning of Section 152 of the Internal Revenue Code.
4. Since September, 1971, my son Stephen G. Ducey has been continuously enrolled full-time in the 9th grade at Cardinal Hayes High School, 149th Street and the Grand Concourse, Bronx, New York 10454 for which I have paid tuition in the amount of \$45.00 per month.
5. For the last several years, my daughter Carol A. Ducey has been continuously enrolled full-time in Our Lady of the Assumption school, 16-17 Parkview Avenue, Bronx, New York 10465 for which I have paid tuition in the approximate amount of \$10.00 per month.

*Affidavit of Joan M. Ducey in
Support of Motion to Intervene*

6. My husband and I had a New York adjusted gross income of less than twenty-five thousand dollars and a New York taxable income in excess of five thousand dollars for the calendar year 1971.

7. I have been informed by my attorneys, Davis Polk & Wardwell, that Section 5 of Chapter 414 of the 1972 Laws of New York, New York Tax Law §612(j) entitles me to a modification of my New York adjusted gross income for payment of nonpublic school tuition.

8. My attorneys have further informed me that an action, captioned above, has been brought wherein the plaintiffs seek to permanently enjoin the enforcement of Chapter 414 of the 1972 Laws of New York (the "Act").

9. To my knowledge, the present defendants are not now and will not be direct recipients of benefits conferred by the Act now challenged and are not now and will not be members of the class(es) for whose benefit the Act was enacted, and I therefore believe that the defendants will not adequately represent my interests and that I am so situated that I could suffer irreparable harm unless I am permitted to intervene in the action as a party defendant.

WHEREFORE, I respectfully request that my motion to intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure be granted.

/s/ JOAN M. DUCEY

Joan M. Ducey

[Jurat omitted in printing]

*Affidavit of Angelina M. Ferrarella in Support
of Motion to Intervene*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF KINGS, ss.:

ANGELINA M. FERRARELLA, being duly sworn, says:

1. I am a resident and citizen of the State of New York.
2. My address is 1945 West 7th Street, Brooklyn, New York 11223.
3. I am the mother of a daughter, Susan A. Ferrarella, age 12, who resides with me and is my "dependent" within the meaning of Section 152 of the Internal Revenue Code.
4. Since September, 1971, my daughter has been continuously enrolled full-time in St. Simon & Jude school, 294 Avenue T, Brooklyn, New York 11223 for which I have paid tuition in the amount of approximately \$225.00.
5. My husband and I had a New York adjusted gross income of less than twenty-five thousand dollars and a New York taxable income in excess of five thousand dollars for the calendar year 1971.

*Affidavit of Angelina M. Ferrarella in
Support of Motion to Intervene*

6. I have been informed by my attorneys, Davis Polk & Wardwell, that Section 5 of Chapter 414 of the 1972 Laws of New York, New York Tax Law §612(j) entitles me to a modification of my New York adjusted gross income for payment of nonpublic school tuition.

7. My attorneys have further informed me that an action, captioned above, has been brought wherein the plaintiffs seek to permanently enjoin the enforcement of Chapter 414 of the 1972 Laws of New York (the "Act").

8. To my knowledge, the present defendants are not now and will not be direct recipients of benefits conferred by the Act now challenged and are not now and will not be members of the class(es) for whose benefit the Act was enacted, and I therefore believe that the defendants will not adequately represent my interests and that I am so situated that I could suffer irreparable harm unless I am permitted to intervene in the action as a party defendant.

WHEREFORE, I respectfully request that my motion to intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure be granted.

/s/ ANGELINA M. FERRARELLA

.....
Angelina M. Ferrarella

[Jurat omitted in printing]

*Affidavit of Nora H. Ferguson in
Support of Motion to Intervene*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF KINGS, ss.:

NORA H. FERGUSON, being duly sworn, says:

1. I am a resident and citizen of the State of New York.
2. My address is 238 Linden Boulevard, Brooklyn, New York 11226.
3. I am the mother of a daughter, Maryann E. Ferguson, age 14, who resides with me and is my "dependent" within the meaning of Section 152 of the Internal Revenue Code.
4. Since September, 1971, my daughter has been continuously enrolled full-time in the 9th grade at Bishop McDonald Memorial High School, 260 Eastern Parkway, Brooklyn, New York for which I have paid tuition in the amount of \$700.00.
5. I had a New York taxable income of less than five thousand dollars for the calendar year 1971.
6. I have been informed by my attorneys, Davis Polk & Wardwell, that Section 2 of Chapter 414 of the 1972 Laws

*Affidavit of Nora H. Ferguson in
Support of Motion to Intervene*

of New York, New York Education Law art. 12-A entitles me to tuition reimbursement payments.

7. My attorneys have further informed me that an action, captioned above, has been brought wherein the plaintiffs seek to permanently enjoin the enforcement of Chapter 414 of the 1972 Laws of New York (the "Act").

8. To my knowledge, the present defendants are not now and will not be direct recipients of benefits conferred by the Act now challenged and are not now and will not be members of the class(es) for whose benefit the Act was enacted, and I therefore believe that the defendants will not adequately represent my interests and that I am so situated that I could suffer irreparable harm unless I am permitted to intervene in the action as a party defendant.

WHEREFORE, I respectfully request that my motion to intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure be granted.

/s/ NORA H. FERGUSON

Nora H. Ferguson

[Jurat omitted in printing]

*Affidavit of Ernest E. Roos, Jr. in
Support of Motion to Intervene*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF QUEENS, ss.:

ERNEST E. ROOS, JR., being duly sworn, says:

1. I am a resident and citizen of the State of New York.
2. My address is 155-19 Jewel Avenue, Apartment 2C, Flushing, New York 11367.
3. I am the father of three daughters, Verlie M. Roos, age 14, Roslyn M. Roos, age 10, and Janet E. Roos, age 9, all of whom reside with me and are my "dependents" within the meaning of Section 152 of the Internal Revenue Code.
4. Since September, 1971, my daughter Verlie M. Roos has been continuously enrolled full-time in the 9th grade at St. Helena High School, 915 Hutchinson River Parkway, Bronx, New York 10465 for which I have paid tuition in the amount of \$50.00 per month.
5. For the last several years, my daughters Roslyn M. Roos and Janet E. Roos have been continuously enrolled full-time in St. Nicholas of Tolentine School, 80-22 Parsons Boulevard, Jamaica, New York 11432 for which I have paid tuition in the approximate amount of \$150.00 per school year.

*Affidavit of Ernest E. Roos, Jr. in
Support of Motion to Intervene*

6. My wife and I had a New York adjusted gross income of less than twenty-five thousand dollars and a New York taxable income in excess of five thousand dollars for the calendar year 1971.

7. I have been informed by my attorneys, Davis Polk & Wardwell, that Section 5 of Chapter 414 of the 1972 Laws of New York, New York Tax Law § 612(j) entitles me to a modification of my New York adjusted gross income for payment of nonpublic school tuition.

8. My attorneys have further informed me that an action, captioned above, has been brought wherein the plaintiffs seek to permanently enjoin the enforcement of Chapter 414 of the 1972 Laws of New York (the "Act").

9. To my knowledge, the present defendants are not now and will not be direct recipients of benefits conferred by the Act now challenged and are not now and will not be members of the class(es) for whose benefit the Act was enacted, and I therefore believe that the defendants will not adequately represent my interests and that I am so situated that I could suffer irreparable harm unless I am permitted to intervene in the action as a party defendant.

WHEREFORE, I respectfully request that my motion to intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure be granted.

/s/ ERNEST E. ROOS, JR.

Ernest E. Roos, Jr.

[Jurat omitted in printing]

*Affidavit of Adamina Ruiz in
Support of Motion to Intervene*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK,
COUNTY OF BRONX, ss.:

ADAMINA RUIZ, being duly sworn, says:

1. I am a resident and citizen of the State of New York.
2. My address is 955 Evergreen Avenue, Bronx, New York 10472.
3. I am the mother of two daughters, Evelyn Ruiz, age 17, and Myrna Ruiz, age 15, both of whom reside with me and are my "dependents" within the meaning of Section 152 of the Internal Revenue Code.
4. Since September, 1971, my daughter Evelyn Ruiz has been continuously enrolled full-time in the 11th grade at Cathedral High School, 560 Lexington Avenue, New York, New York for which I have paid tuition in the amount of \$20.00 per month.
5. Since September, 1971, my daughter Myrna Ruiz has been continuously enrolled full-time in the 10th Grade at St. Peter & Paul School, 828 Brook Avenue, Bronx, New

*Affidavit of Adamina Ruiz in
Support of Motion to Intervene*

York for which I have paid tuition in the amount of \$20.00 per month.

6. My husband and I had a New York taxable income of less than five thousand dollars for the calendar year 1971.

7. I have been informed by my attorneys, Davis Polk & Wardwell, that Section 2 of Chapter 414 of the 1972 Laws of New York, New York Education Law art. 12-A entitles me to tuition reimbursement payments.

8. My attorneys have further informed me that an action, captioned above, has been brought wherein the plaintiffs seek to permanently enjoin the enforcement of Chapter 414 of the 1972 Laws of New York (the "Act").

9. To my knowledge, the present defendants are not now and will not be direct recipients of benefits conferred by the Act now challenged and are not now and will not be members of the class(es) for whose benefit the Act was enacted, and I therefore believe that the defendants will not adequately represent my interests and that I am so situated that I could suffer irreparable harm unless I am permitted to intervene in the action as a party defendant.

WHEREFORE, I respectfully request that my motion to intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure be granted.

/s/ ADAMINA RUIZ

Adamina Ruiz

[Jurat omitted in printing]

Exhibit A Annexed to Motion to Intervene

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
 BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
 THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
 ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
 BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
 ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
 DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
 and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
 State of New York, ARTHUR LEVITT, as Comptroller of
 the State of New York, and NORMAN GALLMAN, as Com-
 missioner of Taxation and Finance of the State of
 New York,

Defendants.

ANSWER OF INTERVENOR-DEFENDANTS

Intervenor-defendants Geraldine M. Boylan, 3445 Hol-
 land Avenue, Bronx, New York 10467, Priscilla L. Cherry,
 660 Willoughby Avenue, Brooklyn, New York 11206, Joan
 M. Ducey, 3226 Country Club Road, Bronx, New York

Exhibit A Annexed to Motion to Intervene

10465, Nora H. Ferguson, 238 Linden Boulevard, Brooklyn, New York 11226, Angelina M. Ferrarella, 1945 West 7th Street, Brooklyn, New York 11223, Ernest E. Roos, Jr., 155-19 Jewel Avenue, Flushing, New York 11367 and Adamina Ruiz, 955 Evergreen Avenue, Bronx, New York 10472, by their attorneys, Davis Polk & Wardwell, on their own behalf and on behalf of all other individuals similarly situated in the State of New York, for their answer to the complaint herein:

1. Deny paragraph 1, except admit that this is a civil action, that it is purportedly brought on behalf of all the plaintiffs named in the complaint and that it seeks preliminary and permanent injunctions.
2. Deny paragraphs 2 and 3.
3. State that they are without knowledge or information sufficient to form a belief as to the truth of paragraphs 4 and 5.
4. Admit paragraphs 6 and 7.
5. Deny paragraphs 8, 9, 10 and 11.
6. State that they are without knowledge or information sufficient to form a belief as to the truth of paragraph 12.
7. Admit paragraph 13.
8. Deny paragraphs 14, 15, 16 and 17.

Exhibit A Annexed to Motion to Intervene

FIRST AFFIRMATIVE DEFENSE

9. This court lacks jurisdiction over the subject matter of this action.

SECOND AFFIRMATIVE DEFENSE

10. The complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

11. Plaintiffs' action seeks relief in violation of intervenor-defendants' right to the free exercise of religion, as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Constitution of the State of New York.

FOURTH AFFIRMATIVE DEFENSE

12. Plaintiffs' action seeks relief in violation of intervenor-defendants' right to the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the Constitution of the State of New York.

FIFTH AFFIRMATIVE DEFENSE

13. Plaintiffs' action seeks to deprive intervenor-defendants of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States

Exhibit A Annexed to Motion to Intervene

Constitution and Article I, Section 6 of the Constitution of the State of New York.

WHEREFORE, intervenor-defendants demand judgment dismissing plaintiffs' complaint and granting to said intervenor-defendants such other and further relief as may be just.

Dated: New York, New York
June 12, 1972

DAVIS POLK & WARDWELL

By /s/ PORTER R. CHANDLER

A Member of the Firm

Attorneys for Intervenor-defendants

1 Chase Manhattan Plaza

New York, New York 10005

Tel.: HA 2-3400

**Order to Show Cause and Affidavit in Support
of Application for Leave to Intervene**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of
New York,

Defendants.

Upon the annexed motion of Earl W. Brydges and the
affidavit of John F. Haggerty and Louis P. Contiguglia,
sworn to the 15th day of June, 1972 and the proposed an-
swer annexed thereto and upon all prior proceedings here-
tofore had herein, it is hereby:

*Order to Show Cause and Affidavit in Support
of Application for Leave to Intervene*

ORDERED, that the plaintiffs and the defendants herein show cause before this Court, at Room 506 of the United States Court House, Foley Square, New York, New York at 10 o'clock in the forenoon on the 20th day of June, why an order pursuant to Rule 24 should not issue allowing Senator Earl W. Brydges, President Pro Tem and Majority Leader of the New York State Senate, to intervene in this case as a party defendant in his representative capacity and that he have all the rights and standing of a party on the grounds that in his representative capacity and on behalf of the New York State Senate he has a direct, vital and paramount interest in the subject matter of this action, that in his representative capacity as party defendant the disposition of this action may as a practical matter impair or impede his ability to protect the interests of the Senate of the State of New York and on the ground that the applicant's interests are not presently and adequately represented herein in view of the fact that only the Legislature can develop the issues which must be inherent in any determination of this Court; and it is further

ORDERED that personal service of a copy of this order and the papers upon which it was granted, by the close of business 6 PM on the 16th day of June, 1972, upon the attorneys appearing for each of the named parties herein, shall constitute due and sufficient service of this order.

Dated: New York, New York
June 16, 1972

/s/ IRVING BEN COOPER
U.S.D.J.

*Order to Show Cause and Affidavit in Support
of Application for Leave to Intervene*

To:

LEO PFEFFER, Esq.

Attorney for Plaintiffs

15 East 84th Street

New York, New York 10028

HONORABLE LOUIS J. LEFKOWITZ

Attorney General of the State of New York

Mrs. Jean M. Coon

Assistant Solicitor General

PORTER R. CHANDLER, Esq.

One Chase Manhattan Plaza

New York, New York 10005

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York,
County of Albany, ss.:

JOHN F. HAGGERTY and LOUIS P. CONTIGUGLIA, being individually duly sworn, depose and say:

1) Each is an attorney licensed to practice law in the State of New York, and each is a Counsel to the Senate of the State of New York and to Senator Earl W. Brydges, the Majority Leader and President Pro Tem of the New York State Senate, and that each deponent makes this affidavit in support of the order to show cause why, in his representative capacities for and on behalf of the Senate of the State of New York and as Majority Leader and President Pro Tem of the New York State Senate, Senator Earl W. Brydges should not be allowed to intervene in this case as party defendant.

2) Senator Earl W. Brydges is also a citizen of the United States of America and a resident of the State of New York. As a citizen, a State legislator, Majority Leader of the State Senate and President Pro Tem of one of the two legislative bodies of the New York State Legislature,

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

Senator Earl W. Brydges has a paramount interest in common with the other members of the New York State Senate in upholding the constitutionality of Chapter 414 of the 1972 Laws of New York. The purpose for the intervention of Senator Earl W. Brydges in this action is to protect the interest of the New York State Legislature in the exercise of its constitutional right to a free and open debate of any subject or issue, no matter how politically divisive it may be on segments of our society. The exercise of this right has been curtailed by recent Federal court decisions involving issues similar to those in this law suit. Those decisions have expressly, and by innuendo, curtailed the rights of State legislative bodies to freely and openly debate issues which are "potentially divisive." The basis of these Federal court decisions is the opinion of the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In that case the Court observed that:

"Ordinarily, political debate and division, however vigorous or even partisan, are normal manifestation of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

"The potential divisiveness of such conflict is a threat to the normal political process."

The Supreme Court issued this pronouncement in declaring unconstitutional a Pennsylvania law providing public

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

funds for teaching non-religious courses in private schools. In so ruling the Court acknowledged its chief concern was not whether the law aided religion, but that it involved "excessive entanglement" of religion in government. This entanglement, the Court concluded, violated the First Amendment provision of separation of church and state. The Court implied that this excessive entanglement exists in the normal political activity of our legislative bodies when considering issues which peripherally touch upon a religious question. The Supreme Court's reaction in *Lemon v. Kurtzman* to entanglement of religion and government cannot be taken as a "passing fancy." In recent months other Federal courts have relied upon the pronouncement in the *Lemon* case to curtail efforts by various legislative bodies throughout the country to seek solutions to the fiscal plight of nonpublic schools.

For example, in March of this year a three-panel Federal court declared unconstitutional a Vermont law which partially reimbursed public school teachers for teaching non-religious courses in parochial schools. (*Americans United for Separation of Church and State v. Oakey*, 40 L.W. 2597 (1972)). The court noted:

"Any such involvement carries with it the explosive potential for citizen friction and political sub-division along religious lines."

Similar restrictions on the freedom of state legislatures to debate issues involving religious overtones was evidenced in the month of March of this year when Federal courts in Pennsylvania and Ohio struck down laws reimbursing

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

parents for children's tuition payments in private schools. (*Wolman v. Essex*, USDC, SE Dist., Ohio (1972)). Particularly significant is the decision of the Federal court in Ohio, which states, in part, that the plan

"... contains the seeds for increased political involvement along religious lines at every level of government. . . . To uphold this statute would be to introduce the religious issue to the very center of state politics. . . . the political issue will be an expansive one . . . with the result that the issue will be joined along sharply drawn religious lines."

A three-panel Federal district court in the Southern District of New York in March of this year has likewise implied that restrictions are imposed on the freedom of the state legislature to debate legislation touching on religious issues. (*Committee for Public Education and Religious Liberty v. Rockefeller*, USDC, So. Dist., N.Y. (1972)). The majority decision noted that

"... it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents."

The pronouncement of the Supreme Court in the *Lemon* case, as applied in this line of recent Federal cases, has been resorted to with devastating consequences. Underway is a dangerous trend to restrict the freedom historically enjoyed by the New York State Legislature and other legislative bodies to respond to diverse problems,

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

which by necessity demands free and open discussion of every conceivable issue. As noted by Judge Edmund Palmieri in his dissent in the Southern District of New York case,

"Government and political activity should play a part in searching for ways . . . that will preserve, and indeed promote, the diversity of individual beliefs—political, social and religious—that distinguish us so plainly from certain uniform, unified and ungoverned societies elsewhere in the world."

In the event that this concept curtailing legislative debate is continued in this action, no longer will legislative bodies operate as a forum for free and open discussion. Indeed there is a danger that the resolution of peculiarly volatile issues will no longer continue within the framework of our democratic process. It is submitted that the unfortunate trend that may develop from these recent Federal court decisions is to encourage elements of our society to seek solutions to our social, political and economic problems in a manner that is "extra-legal."

3) On information and belief, the interests of the New York State Legislature may not be adequately represented by the named government-party defendants in this action. The primary concern of the named party defendants is to uphold the payments authorized by Chapter 414 of the 1972 Laws of New York. The interest of Senator Earl W. Brydges, as intervenor in his representative capacity as leader of one of the two major Houses of the New York State Legislature, is much broader.

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

The Courts of the United States have attempted to exercise a jurisdiction so large and so great in terms of breadth and width, that sometimes those who serve in the States of the Union lose track of the fact that the Federal Government is not the paramount body in the United States of America. In the Federal Government and its Judiciary does not repose the sovereignty, except to the extent that the States have given it to them. The sovereignty of the individual and of the States under the reserved powers concept (U.S. Constitution Articles IX and X) reposes not there but with the States, and the fact that the States do have this residuum of sovereignty makes theirs the responsibility of preserving that which remains.

It is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its debate. Clearly, the states have allowed and authorized the courts of the United States to pass upon the constitutional issues of our final product, the statutes which we pass. But nowhere can be found the authority for the courts to dictate that which would be the subject of colloquy.

Only the Legislature can address itself to this question and it is beyond the possibility or reach of their respective offices for the three-named defendants in this action to give any consideration or representation on this issue. Your applicant in his representative capacity as President Pro Tem of the New York State Senate and as its Majority Leader, empowered by its own rules to control the proceedings and debate within the body, is the only one so situated as to fairly and adequately come to grips with this question.

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

4) It is indeed questionable whether the named government defendants are truly the real parties in interest in this action. Under the Constitution of the State of New York, it would seem clear that it is the Legislature, and the Legislature only, that is so situated as to claim the paramount interest relating to the property or transaction which is the subject of this law suit. It is peculiarly the Legislature's interest that the disposition of this action may as a practical matter impair or impede.

The first-named defendant, EWALD B. NYQUIST, is the Commissioner of Education of the State of New York. Pursuant to Article V Section 4 of the New York State Constitution, he is appointed by the Board of Regents of the State of New York. The powers and authority of the Board of Regents of the State of New York, pursuant to the Constitution of the State of New York, Article XI Section 2, may be increased, modified or diminished by the Legislature. Section 1 of Article XI of the New York State Constitution charges the Legislature of the State of New York with the maintenance and support of a system of free common schools wherein all the children of this State may be educated. It would appear then to be beyond question that the ultimate responsibility both for determining educational policy and for providing for the education of the children of the State of New York is with the Legislature and not the Commissioner of Education of the State of New York.

The second-named defendant, ARTHUR LEVITT, as Comptroller of the State of New York, is charged simply with the responsibility of auditing claims and vouchers filed with or against New York State. His participation in this proceed-

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

ing is simply in the capacity of a "paymaster" without responsibility for the formulation of educational policies within the State of New York or the education of the children of the State of New York.

The third-named defendant, NORMAN F. GALLMAN, as Commissioner of Taxation and Finance, likewise exercises an administrative role in carrying out the procedural tax administrative acts embodied within the legislative enactments providing for aid to nonpublic school children.

It is claimed in this action that the State statute under attack involves the expenditure of public funds in support of religious purposes. The determination of how public funds should be expended is a coordinate responsibility of the Legislature and the Executive Branch of government and does not in any way involve the three-named defendants herein. It should be noted that under the Constitution of the State of New York, the Legislature has even the ultimate say as to how public monies should be expended, in that the Governor submits a proposed budget to the Legislature which the Legislature may or may not adopt in whole or in part and a rejection of any of the parts by the Legislature is final on the question.

It would be singularly the responsibility of the Legislature of the State of New York to impose the necessary taxes to raise revenues to support the educational burden that would be created by a sudden, precipitous and catastrophic closing of the nonpublic schools of this State which presently educate approximately 800,000 children or 20% of all children attending schools in our State. Such fiscal and political consequences can be fully appreciated and evaluated only by the Legislature.

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

Thus, it is submitted that the entity that has the foremost interests in the subject matter of this action is the Legislature of the State of New York and it is in his capacity as a primary representative of that entity that your applicant seeks to intervene in this action. Only your applicant can adequately develop and represent to this court the three paramount issues inherent in any determination of this action:

(i) The reserved sovereign power of the Legislature of the State of New York to uninhibited and untrammelled debate.

(ii) The responsibility for the development of educational policy and the education of the children within the State of New York.

(iii) The responsibility of raising taxes to support a system of education in the State of New York.

5) Your deponents in requesting this court to allow intervention on behalf of the applicant in this action assures this court that the applicant or anyone acting on his behalf will not delay or prejudice the adjudication of the rights of the original parties. We are ready to proceed forthwith.

6) The reason this application is made by order to show cause and not by notice of motion is that a request is made that this matter be made returnable on Tuesday, June 20, 1972. Upon information and belief your deponents are advised that another proceeding in this action is returnable in this court on that date and it is requested that this application for intervention be made returnable at that time so

*Affidavit of John F. Haggerty and Louis P. Contiguglia
in Support of Application for Leave to Intervene*

that it may be disposed of by this court on that date and that your deponents on behalf of Senator Earl W. Brydges be allowed to participate in those other proceedings in this action on that date.

7) In accordance with Rule 24(c) of the Federal Rules of Civil Procedure, annexed hereto as Exhibit A, is a proposed pleading setting forth the defenses for which intervention is sought.

8) No previous application has been made to any court or any judge for the relief requested herein.

WHEREFORE, it is requested that Senator Earl W. Brydges as Majority Leader and President Pro Tem of the New York State Senate be allowed to intervene in this case as a party defendant, or in such representative capacity, and on behalf of other senators in the New York State Senate similarly situated, that he have all the rights and standing of the party, and for such other and further relief as to this Court may seem just and proper.

/s/ JOHN F. HAGGERTY

JOHN F. HAGGERTY

/s/ LOUIS P. CONTIGUGLIA

LOUIS P. CONTIGUGLIA

[Jurat omitted in printing]

*Exhibit A Annexed to Affidavit of
John F. Haggerty and Louis P. Contiguglia*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
AND CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Defendants,

and

EARL W. BRYDGES, as Majority Leader and President Pro
Tem of the New York State Senate,

Intervenor-defendant

Intervenor-Defendant

*Exhibit A Annexed to Affidavit of
John F. Haggerty and Louis P. Contiguglia*

Intervenor-defendant Earl W. Brydges, residing at Niagara Falls, New York, as Majority Leader and President Pro Tem of the New York State Senate, by his attorneys John F. Haggerty and Louis P. Contiguglia, in his representative capacity for and on behalf of the Senate of the State of New York and as Majority Leader and President Pro Tem of the New York State Senate, for his answer to the complaint herein:

1. Denies paragraph 1, except admits that this is a civil action, that it is purportedly brought on behalf of all the plaintiffs named in the complaint and that it seeks preliminary and permanent injunctions.

2. Denies paragraphs 2 and 3.

3. States that he is without knowledge or information sufficient to form a belief as to the truth of paragraphs 4 and 5.

4. Admits paragraphs 6 and 7.

5. Denies paragraphs 8, 9, 10 and 11.

6. States that he is without knowledge or information sufficient to form a belief as to the truth of paragraph 12.

7. Admits paragraph 13.

8. Denies paragraphs 14, 15, 16 and 17.

FIRST DEFENSE

9. This court lacks jurisdiction over the subject matter of this action.

*Exhibit A Annexed to Affidavit of
John F. Haggerty and Louis P. Contiguglia*

SECOND DEFENSE

10. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

11. The federal government and its judiciary lack jurisdiction to proscribe the parameters of debate of the Legislature of the State of New York.

WHEREFORE, defendant Earl W. Brydges, in his representative capacity as Majority Leader and President Pro Tem of the Senate of the State of New York, demands a judgment and decree of this Court dismissing the complaint herein and declaring Chapter 414 of the New York Laws of 1972 to be constitutional.

Dated: Albany, New York
June 15, 1972

/s/ JOHN F. HAGGERTY

John F. Haggerty

/s/ LOUIS P. CONTIGUGLIA

Louis P. Contiguglia
Attorneys for Intervenor-
Defendant Earl W. Brydges
The Capitol
Senate Chambers
Albany, New York

Order Granting Leave to Intervene
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller
of the State of New York, and NORMAN GALLMAN, as
Commissioner of Taxation and Finance of the State
of New York,

Defendants.

Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey,
Nora H. Ferguson, Angelina M. Ferrarella, Ernest E.
Roos, Jr. and Adamina Ruiz having moved to intervene
as parties defendant in this action pursuant to Rule 24
of the Federal Rules of Civil Procedure, and the Court

Order Granting Leave to Intervene

having considered said motion, the affidavits of the proposed intervenors, the Affidavit of Porter R. Chandler, sworn to June 12, 1972, and the proposed Answer of the aforesaid intervenors, and it appearing to the Court that notice of said motion has been duly served on all parties to this action, that none of such parties is opposed to the proposed intervention and that the proposed intervenors are entitled to become parties and should be permitted to intervene as defendants in this action, and the Court being fully advised in the premises;

Now, it is hereby

ORDERED that Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr. and Adamina Ruiz be, and each of them hereby is, granted leave to intervene in this action as a party defendant; and it is further

ORDERED that the proposed Answer of intervenor-defendants heretofore served on all other parties to this action be filed with the Clerk of this Court as the answer of said intervenor-defendants to plaintiff's complaint; and it is further

ORDERED that the official caption of this action be, and it hereby is, amended to read as follows:

Order Granting Leave to Intervene

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller
of the State of New York, and NORMAN GALLMAN, as
Commissioner of Taxation and Finance of the State
of New York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M.
DUCY, NORA H. FERGUSON, ANGELINA M. FERRARELLA,
ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-defendants.

Dated: New York, New York
June 20, 1972

/s/ M. I. GURFEIN
U.S.D.J.

Answer of State Defendants

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Defendants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M.
DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA,
ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

and

EARL W. BRYDGES, as Majority Leader and President Pro
Tem of the New York State Senate,

Intervenor-Defendant.

Answer of State Defendants

The defendants Ewald B. Nyquist, Arthur Levitt, and Norman Gallman, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for their answer to the complaint herein:

1. Admit the allegations contained in paragraphs 6, 7, 13, and 16 of the complaint herein.

2. Deny each and every allegation contained in paragraphs 3, 14, 15, and 17 of the complaint herein.

3. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 4, 5, and 12 of the complaint herein.

4. As to the allegations contained in paragraph 1 of the complaint herein, admit that those allegations are the stated basis for the action herein and state the claims of the plaintiffs herein, but deny any conclusions as to the validity of those allegations and claims which might be drawn from those allegations.

5. As to the allegations contained in paragraph 2 of the complaint herein, admit that the jurisdiction of this Court is invoked in this action as stated therein, but deny any conclusions as to the validity of the claims in such action which might be drawn from those allegations.

6. As to the allegations contained in paragraphs 8, 9, and 10 of the complaint herein, deny that Chapter 414 of the Laws of 1972 specifically refers to 'sectarian schools, sets any religious test for the qualification of schools or

Answer of State Defendants

parents in order to receive the statutory benefits provided under the act, or in any way limits the application of the act to only nonpublic schools which are sectarian in control or teaching. Additionally, as to the allegations contained in paragraph 9 of the complaint herein, deny that the act provides for payment of tuition to schools and allege that reimbursement is provided to low income parents for a portion of the tuition paid by them to nonpublic schools, regardless of the nature of the school.

7. As to the allegations contained in paragraph 11 of the complaint herein, deny that Chapter 414 authorizes or directs payment for the purpose of sectarian instruction or worship, or provides for the payment of money specifically for the maintenance or repair of such facilities, but rather provides for the payment of moneys for maintenance and repair of nonpublic school facilities, whatever the nature of the school, in order to provide for the health and safety of the children attending those schools.

8. As to the allegations contained in paragraph 18 of the complaint herein, deny that Chapter 414 of the Laws of 1972 is unconstitutional and further deny that plaintiffs are entitled to any or all of the relief requested therein, or to any other relief.

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE TO THE
COMPLAINT HEREIN, DEFENDANTS ALLEGE:

9. Among the powers reserved to the States under the Constitution of the United States is the police power, that

Answer of State Defendants

is, the power to enact laws necessary to protect the health, welfare and safety of their inhabitants.

10. In enacting Article 12 of the Education Law, as added by Chapter 414 of the New York Laws of 1972, the Legislature specifically found that the State has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools; that the fiscal crisis in nonpublic education has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas; that nonpublic schools in low income areas are characterized by deteriorating physical structures; that the parents of children enrolled in nonpublic schools in such low income areas do not have the financial resources necessary to maintain the structures; and that the State has the right and obligation to ensure that the physical environment in nonpublic schools in such areas is both healthful and safe.

11. Article 12 of the Education Law was enacted to ensure such a safe and healthy physical environment for nonpublic school children.

12. Not all nonpublic schools are eligible for or may receive grants under Article 12.

13. To qualify for grants pursuant to Article 12, a school is required to be nonprofit, to be tax exempt, to provide education which satisfies the State compulsory education law, and have been designated as serving a high concentration of pupils from low income families for the purposes of Title

Answer of State Defendants

IV of the Federal Higher Education Act of 1965 (20 U.S.C.A. § 425).

14. Health, welfare and safety grants are provided in an amount equal to \$30 per pupil to be applied for costs of maintenance and repair. The grant will be increased by \$10 per pupil where the school building was built prior to 1947.
15. Schools are required to provide an audited statement of the amount spent for maintenance and repair in each year.
16. The grant provided to any school under this act may not exceed 50% of the average per pupil cost of equivalent maintenance and repair in the public schools of the State, nor may it exceed the amount actually expended for maintenance and repair as reported in the required audited statement.
17. The statute is a police power enactment with a secular purpose and primary effect. Its purpose is not to provide aid to nonpublic or sectarian schools but to protect school children from the dangers of unhealthy or unsafe school buildings. It does not result in excessive entanglement between government and religion.
18. The Supreme Court of the United States in *Everson v. Board of Education* (330 U. S. 1 [1947]) held constitutional school bus transportation provided for the safety of nonpublic school children.

Answer of State Defendants

19. The health and safety of nonpublic school children can be constitutionally protected by the State by such means as the Legislature deems appropriate, including health and safety grants to nonpublic schools.

20. Article 12 of the Education Law, as added by Chapter 414 of the Laws of 1972 is constitutional and valid.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE TO THE
COMPLAINT HEREIN, DEFENDANTS ALLEGE:

21. In enacting Article 12-A of the New York Education Law, as added by Chapter 414 of the New York Laws of 1972, the Legislature specifically recognized that parents have a constitutional right to select either a public or nonpublic school education for their children, including a sectarian education; that that right is diminished or even denied to children of lower income families; and that the State has a right to make provision so that such families and their children are not prevented from exercising that constitutional right of selection because of their inability to pay.

22. Article 12-A would provide partial tuition reimbursement to parents of nonpublic school children, where the parents' State net taxable income is under \$5,000 per year.

23. Tuition reimbursement would be provided under Article 12-A in an amount equal to the lesser of 50% of tuition paid or \$5 per pupil per month in elementary school or \$10 per month in secondary school.

Answer of State Defendants

24. The Supreme Court of the United States has held that parents are constitutionally guaranteed the right to select a nonpublic education for their children, including sectarian education, as opposed to a public school education. (*Pierce v. Society of Sisters*, 268 U. S. 510 [1925].)

25. The Supreme Court has further held that access of citizens to the exercise of constitutional rights cannot be denied by a State because of inability to pay for the exercise of those rights (*Boddie v. Connecticut*, 401 U. S. 371 [1971]; *Harper v. Virginia State Board of Elections*, 383 U. S. 663 [1966]).

26. New York's provision for partial tuition reimbursement is reasonably calculated to enable low income parents to secure effective access to a constitutionally protected nonpublic school education.

27. The method by which reimbursement is provided does not result in excessive entanglement between the State and religion. The purpose and primary effect is secular, that is, the securing of constitutionally protected rights of citizens.

28. Article 12-A of the Education Law, as added by Chapter 414 of the Laws of 1972, is constitutional and valid.

**FOR A THIRD, SEPARATE AND DISTINCT DEFENSE TO THE
COMPLAINT HEREIN, DEFENDANTS ALLEGE:**

29. The State has plenary power to determine the method of taxing private income of State residents.

Answer of State Defendants

30. The State has plenary power to determine the method of computing taxable income.

31. The State has plenary power to determine the portion of a resident's income which shall be subject to taxation.

32. The State permits taxpayers to claim almost all Federally permitted deductions in computing taxable income, including contributions to sectarian institutions and job related education expenditures. The State also permits some deductions not Federally recognized, such as life insurance premiums.

33. The Supreme Court of the United States has held that property of sectarian institutions may be exempted from taxation (*Walz v. State Tax Commission*, 397 U. S. 664 [1970]).

34. Chapter 414 of the New York Laws of 1972 added a new subsection j to section 612 of the New York Tax Law to permit parents of children in nonpublic schools to reduce their net taxable income by a fixed amount per child so enrolled, not exceeding three such children. The amount so deductible depends upon the income of the parents, lesser amounts being deductible as gross income increases.

35. The purpose and primary effect of this statute is to provide tax relief to tuition paying parents of children in nonpublic schools. Such purpose and primary effect is exclusively secular and provides no entanglement between the State and religion.

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Answer of State Defendants

36. Subsection j of section 612 of the Tax Law is clearly constitutional and valid.

WHEREFORE, defendants pray that the Court enter judgment holding Chapter 414 of the New York Laws of 1972 to be constitutional and valid and dismissing the complaint herein, and granting such other and further relief to the defendants as the Court may deem just and proper.

June 21, 1972

LOUIS J. LEFKOWITZ

*Attorney General of the
State of New York*

Attorney for the State Defendants

By: /s/ JEAN M COON

JEAN M. COON

Assistant Solicitor General

Office and P. O. Address

The Capitol

Albany, New York 12224

Telephone: (518) 474-7138

Order Granting Leave to Intervene
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

A motion having come on to be heard, by order to show cause, why an order, pursuant to Rule 24, should not issue allowing Senator Earl W. Brydges, President Pro Tem and Majority Leader of the New York State Senate, to intervene in this case as a party defendant in his representative capacity and that he have all the rights and standing of a party, and the Court having considered said motion and the proposed answer tendered therewith, and it appearing to the Court that due and sufficient notice of said motion has been served on all parties to this cause, and there being no opposition thereto, and due deliberation being had thereon, it is

ORDERED that Senator Earl W. Brydges in his representative capacity as the Majority Leader and President Pro Tem of the New York State Senate, has leave to intervene in this cause and is hereby made a party thereto and to that end may file his said answer in the same manner and with like effect as if named an original party to this cause.

/s/ M. I. GURFEIN
U.S.D.J.

Dated: June 20, 1972

Answer of Intervenor-Defendant Brydges**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

[TITLE OMITTED IN PRINTING]

Intervenor-Defendant Senator Earl W. Brydges, residing at Niagara Falls, New York, as Majority Leader and President Pro Tem of the New York State Senate, by his attorneys John F. Haggerty and Louis P. Contiguglia, in his representative capacity for and on behalf of the Senate of the State of New York and as Majority Leader and President Pro Tem of the New York State Senate, for his answer to the complaint herein:

1. Denies paragraph 1, except admits that this is a civil action, that it is purportedly brought on behalf of all the plaintiffs named in the complaint and that it seeks preliminary and permanent injunctions.
2. Denies paragraphs 2 and 3.
3. States that he is without knowledge or information sufficient to form a belief as to the truth of paragraphs 4 and 5.
4. Admits paragraphs 6 and 7.
5. Denies paragraphs 8, 9, 10 and 11.
6. States that he is without knowledge or information sufficient to form a belief as to the truth of paragraph 12.
7. Admits paragraph 13.
8. Denies paragraphs 14, 15, 16 and 17.

Answer of Intervenor-Defendant Brydges

FIRST DEFENSE

9. This court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

10. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

11. The federal government and its judiciary lack jurisdiction to proscribe the parameters of debate of the Legislature of the State of New York.

WHEREFORE, intervenor-defendant Senator Earl W. Brydges, in his representative capacity-as Majority Leader and President Pro Tem of the Senate of the State of New York, demands a judgment and decree of this Court dismissing the complaint herein and declaring Chapter 414 of the New York Laws of 1972 to be constitutional.

Dated: Albany, New York

July 1, 1972

JOHN F. HAGGERTY

LOUIS P. CONTIGUGLIA

Attorneys for Intervenor-Defendant

Earl W. Brydges

The Capitol

Senate Chambers

Albany, New York 12224

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Per Curiam Opinion dated July 21, 1972

[printed in full in Appendix to Jurisdictional
Statement in appeal 72-929 (green), pp. 46a-
47a]

**Opinions of Gurfein and Cannella, JJ. and of
Hays, C.J. dated October 2, 1972**

[printed in full in Appendixes to Jurisdictional
Statements; officially reported at 350 F. Supp. 655
and 350 F. Supp. 674, respectively]

Order Amending Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

ORDERED that the opinion in the above matter dated and entered October 2, 1972, be and it hereby is amended to delete the word "plurality" in the first line of the last paragraph on page 12.

Dated: October 10, 1972.

/s/ PAUL R. HAYS
Paul R. Hays, U.S.C.J.

/s/ JOHN M. CANNELLA
John M. Cannella, U.S.D.J.

/s/ MURRAY I. GURFEIN
Murray I. Gurfein, U.S.D.J.

Order and Judgment dated October 20, 1972

[printed in full in Appendixes
to Jurisdictional Statements]

**Order Noting Probable Jurisdiction
and Consolidating Appeals**

SUPREME COURT OF THE UNITED STATES

Nos. 72-694, 72-753, 72-791, and 72-929

Committee for Public Education and Religious
Liberty et al.,

Appellants,

v.

Ewald B. Nyquist, as Commissioner of Education
of the State of New York, et al.;

Warren M. Anderson, as Majority Leader and President
pro tem of the New York State Senate,

Appellant,

v.

Committee for Public Education and Religious
Liberty, et al.;

Ewald B. Nyquist, as Commissioner of Education
of the State of New York, et al.,

Appellants,

v.

Committee for Public Education and Religious
Liberty, et al.; and

Priscilla L. Cherry et al.,

Appellants,

v.

Committee for Public Education and Religious Liberty,
et al.

*Order Noting Probable Jurisdiction
and Consolidating Appeals*

APPEALS from the United States District Court for the Southern District of New York.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allotted for oral argument.

January 22, 1973

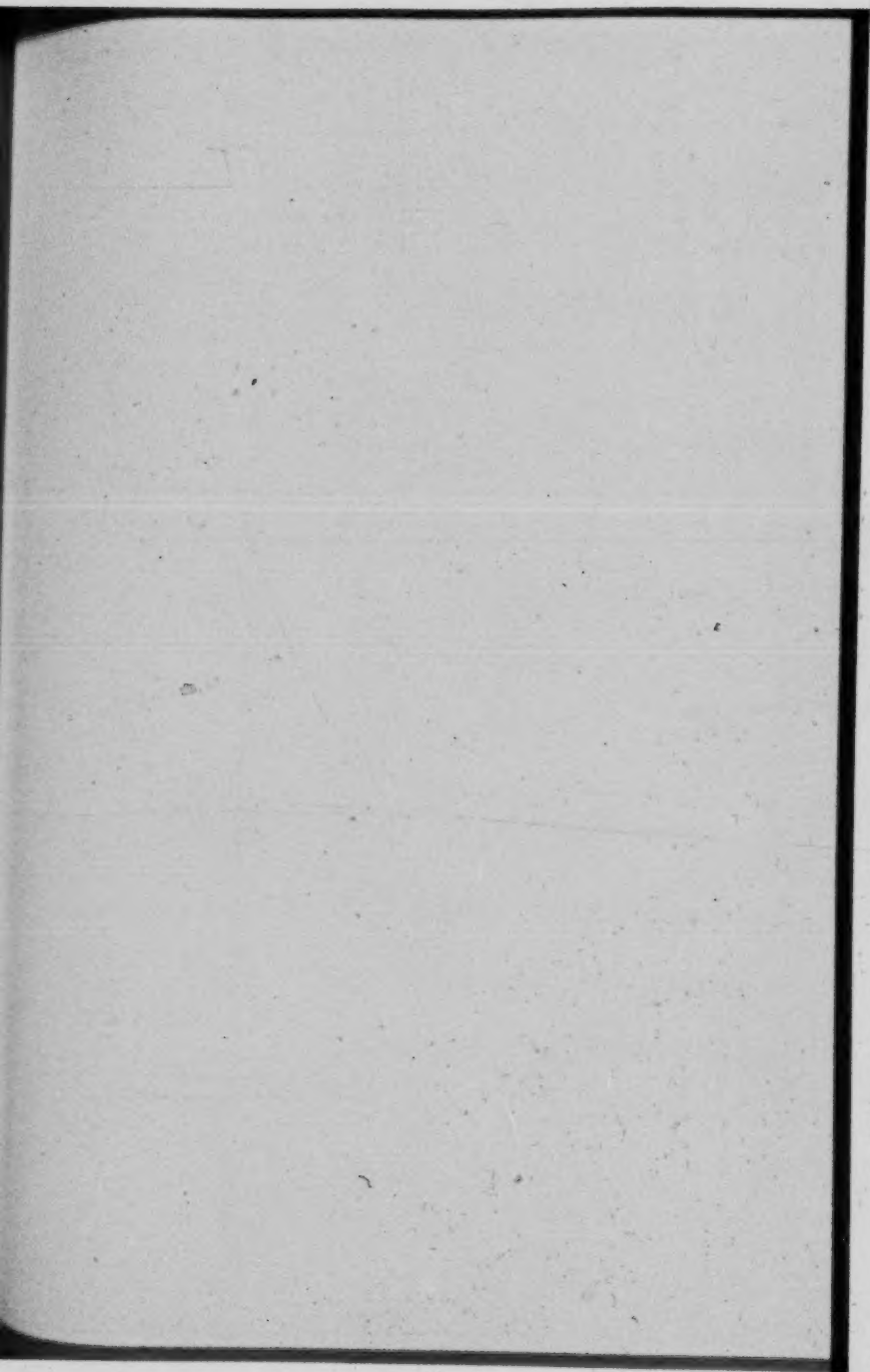
A true copy MICHAEL RODAK, JR.

Test:

Clerk of the Supreme Court of the
United States

By (Illegible)
Deputy

3.



FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

IN THE

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Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1972

No. **72-694**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON
and CHARLES H. SUMNER,

Appellants,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Appellees,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
ROOS, JR. and ADAMINA RUIZ,

Appellees,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

LEO PFEFFER
15 East 84th Street
New York, N. Y. 10028
Attorney for Appellants



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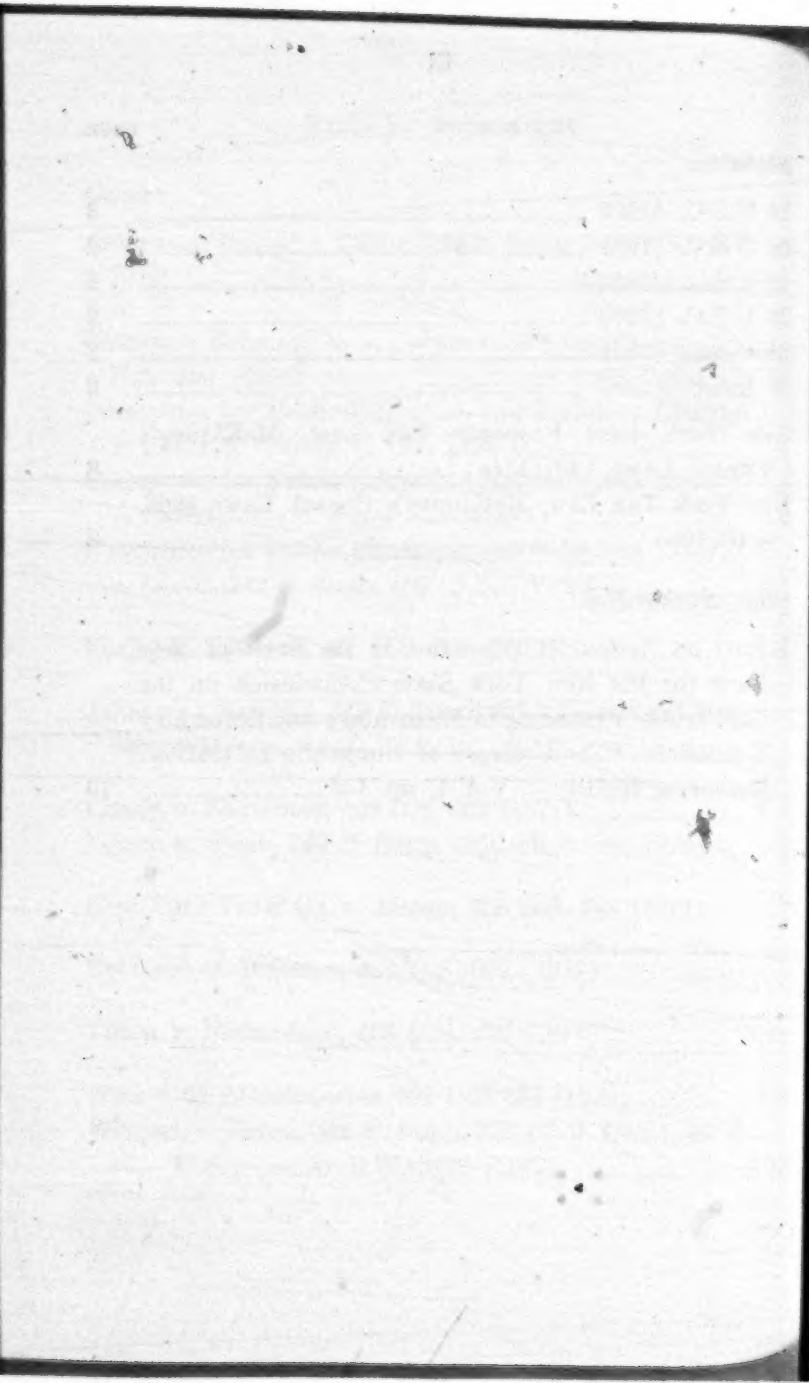
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON
and CHARLES H. SUMNER,

—against— *Appellants,*

ALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

—and— *Appellees,*

LDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
ORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
OOS, JR. and ADAMINA RUIZ,

—and— *Appellees,*

NATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

The appellants herein submit this Statement to show that this Court has jurisdiction of their appeal from so much of the judgment and order of the United States District Court for the Southern District of New York as (a) declares that Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment of the United States Constitution; (b) grants defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the New York Laws of 1972; and (c) dismisses the complaint herein insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the New York Laws of 1972.

Opinions Below

The opinions of the three-judge statutory court are as yet unreported. Copies are set forth as Appendix A hereto beginning at page 1a.

Jurisdiction

This suit was commenced by the appellants herein pursuant to United States Code, Title 28, Sections 1331, 1343 (3), 2281, 2283 and 2202. The complaint challenged the constitutionality of three parts of New York Laws of 1972, Chapter 414 (hereinafter referred to as the Act), set forth as Appendix B hereto beginning at page 47a. The defendants named were Ewald B. Nyquist, Commissioner of Education of the State of New York, Arthur Levitt, Comp-

troller, and Norman Gallman, Commissioner of Taxation and Finance. Thereafter parents of children enrolled in nonpublic schools were permitted to intervene as parties defendant, and like permission was given to Hon. Earl W. Brydges, Majority Leader and President *pro tempore* of the New York State Senate. The judgment and order of the District Court, upholding in part and dismissing in part the complaint herein, was entered on October 20, 1972 and a copy thereof is set forth as Appendix C hereto, at page 59a. The appellants' notice of appeal was filed in the District Court on October 31, 1972 and a copy thereof is set forth as Appendix D hereto, at page 63a.

The jurisdiction of this Court to review the judgment and order by direct appeal is conferred by Title 28, United States Code, Section 1253. Decisions of this Court upholding jurisdiction include *Tilton v. Richardson*, 403 U.S. 672 (1971), *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U.S. 602 (1971).

Statutes Involved

The statute involved in this appeal is Chapter 414 of the New York Laws of 1972, set forth as Appendix B hereto, beginning at page 47a.

Questions Presented

1. Do Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972, which provide tax credits for tuition paid to church-controlled and church-operated elementary and secondary schools violate the Establishment Clause of the First Amendment to the United States Constitution?

2. Are Sections 3, 4 and 5 severable from Sections 1 and 2 of the statute?

Statement of the Case

Chapter 414, the fourth of a series of laws enacted within two years which have been challenged as violative of the Establishment Clause,¹ contains five parts: (1) Section 1, which provides moneys to nonpublic schools for maintenance and repairs; (2) Section 2, which provides flat tuition grants to parents of pupils of low income families attending nonpublic schools; (3) Sections 3, 4 and 5, providing for tax benefits for parents in middle and upper income families; (4) Sections 6 and 7, providing for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and (5) Sections 8, 9 and 10 which provide for the purchase of nonpublic school buildings by public school districts where the nonpublic school has closed down.

It is conceded by all parties that the nonpublic schools referred to throughout the Act include schools which (1) are

¹ Chapter 138, Laws of 1970, financing "mandated services" in nonpublic schools, was declared unconstitutional in *Committee for Public Education and Religious Liberty v. Levitt*, 342 F. Supp. 439 (S.D.N.Y. 1972); an appeal from that decision is pending in this Court. No. 72-270. Chapter 822 Laws of 1971, providing for payment of salaries of nonpublic school teachers, was held unconstitutional in *Committee for Public Education and Religious Liberty v. Levitt*, S.D.N.Y. 1971, unreported; no appeal was taken from that judgment. Chapter 996, Laws of 1972, confers jurisdiction on the State Court of Claims to accept claims from nonpublic schools for loss of payments by reason of the invalidation of the "mandated service" law; a suit challenging the constitutionality of the statute is pending in the United States District Court for the Southern District of New York, *Committee for Public Education and Religious Liberty v. Court of Claims*, 72 Civ. 2493.

controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial and dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

As explained by Judge Gurfein (pp. 7a-8a *infra*), Sections 3, 4 and 5 of the Act provide that an individual shall be entitled to subtract, for State income tax purposes, from his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent.² This exclusion may be taken

² The table is as follows:

<i>If New York adjusted gross income is:</i>	<i>The amount allowable for each dependent is:</i>
Less than \$9,000	\$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	0

(continued on following page)

only by parents with adjusted gross incomes of from \$5,000 under Section 2. The exclusion would be as much as \$1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers as shown in the footnote. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

The appellants herein, an organization committed to the protection of public education and religious liberty and a number of taxpayers some of whom are parents of children attending public schools, instituted suit challenging the constitutionality under the Establishment and Free Exercise Clauses of only parts 1, 2 and 3 of the Act, and seeking judgment declaring their unconstitutionality and enjoining their enforcement.

Separate motions for intervention as parties defendant were made by a group of parents of children in nonpublic schools and by State Senator Earl W. Brydges, as Majority Leader and President *pro tempore* of the New York State Senate. Both motions were granted.

Estimated Net Benefit to Family (see p. 45a <i>infra</i>).		
<i>One Child</i>	<i>Two Children</i>	<i>Three or more</i>
\$50.00	\$100.00	\$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

A three-judge court was duly convened, consisting of Circuit Court Judge Paul R. Hays and District Court Judges John M. Cannella and Murray I. Gurfein. After a hearing on the merits, the Court unanimously held parts 1 and 2 of the Act violative of the Establishment Clause. As to part 3, the Court was divided: Judges Cannella and Gurfein in an opinion written by the latter, held that this part did not violate the Establishment Clause; Judge Hays dissented. Judges Cannella and Gurfein also held that part 3 was severable from parts 1 and 2, and as to this too Judge Hays dissented.

The Questions Are Substantial

I. The Establishment Clause

We submit respectfully that Sections 3, 4 and 5 of Chapter 414 are an ingenious attempt to do by indirection what it is forbidden to do directly, namely finance tuition payments to schools that provide sectarian instruction and religious worship. We suggest that sophisticated devices such as this are no less immune to judicial challenge than the more simplistic ones of salary supplements,³ "purchase of services" payments,⁴ "mandated services" payments,⁵ assignment of publicly employed personnel to teach in church schools,⁶ maintenance payments,⁷ and tuition reimburse-

³ Invalidated in *Earley v. DiCenso*, *supra*; *Johnson v. Sanders*, 319 F. Supp. 421, affirmed 403 U.S. 955 (1971).

⁴ Invalidated in *Lemon v. Kurtzman*, *supra*.

⁵ Invalidated in *Committee for Public Education and Religious Liberty v. Levitt*, 342 F. Supp. 439 (S.D.N.Y. 1972).

⁶ Invalidated in *Americans United v. Oakey*, 339 F. Supp. 545 (D.C. Vt., 1972).

⁷ Invalidated in the instant case.

ments.* Since many low-income parents do not pay any state income tax, the more sophisticated device of tax exclusions is not available, so tuition grants have to be used; but the purpose and effect are exactly the same. It is hardly a coincidence that as noted by Judge Hays (*infra*, p. 45a) the tax exclusion benefits begin just about where the tuition benefits stop, i.e., about \$50 per child.

The majority in the District Court based its decision primarily if not exclusively on *Walz v. Tax Commission*, 397 U.S. 664 (1970). That case upheld the constitutionality under the Establishment Clause of laws exempting church property from real estate taxation. But Chapter 414 is not a tax exemption statute. Every one of the nonpublic schools in the State of New York (other than profit making schools which in any event are not within the compass of the statute) is already tax exempt⁹ and Chapter 414 adds nothing to their exemption.

Even if it be assumed that tax deductions for contributions to churches are within the ambit of *Walz* and are constitutional (not yet decided by this Court), and even if it be assumed that tuition to church schools is constitutionally equivalent to contributions to churches (strongly challenged by Judge Hays, *infra*, p. 44a), the fact remains that Chapter 414 is not a tax deduction statute. Contributions to church schools are already deductible under New York law,¹⁰ and Chapter 414 specifically provides that its benefits are available even if the taxpayer elects not to itemize

* Invalidated in *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio), affirmed — U.S. —, 41 L.W. 3167 (1972), *Lemon v. Sloan*, 340 F. Supp. 1356 (E.D. Pa., 1972), and in the instant case.

⁹ N. Y. Real Property Tax Law Sec. 421(1)(a) (McKinney Supp. 1971).

¹⁰ N. Y. Tax Law Sec. 360(10b) (McKinney 1966).

his contributions. Moreover, and most important, in deductions the amount deducted from reportable income is the amount of the contribution; Chapter 414 does not measure the exclusion by the amount of tuition paid by the taxpayer but by the amount of his gross income and the number of children he has in nonpublic schools. There is all the difference in the world between a deduction of \$150 from the reportable income of a man with three children attending a nonpublic school and a deduction of \$3,000, which is what Chapter 414 authorizes.

We note too that in *Walz* both the Court's opinion by the Chief Justice (397 U.S. at 675-679) and the concurring opinion of Mr. Justice Brennan (at 681) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of constitutionality. Chapter 414 does not come to the Court with that protection. It is a novel device fashioned to evade the constitutional barrier to tuition grants.

Finally, the Court in *Walz* emphasized that the legislature has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.

• • • (*Ibid.*, at p. 672)

Chapter 414, on the other hand, does single out nonpublic schools (of which all but 6.5% are religious schools)¹¹ for preferential treatment. A taxpayer who contributes \$150 to a hospital or library or playground can deduct only that amount from his reportable income; but if he pays \$150 in tuition (for which he gets in return at least some secular education for his children) he may deduct as much as \$3,000. This, we submit, is not a tax deduction; it is a thinly disguised tax credit,¹² which in turn is a thinly disguised tuition grant. We can see no realistic or constitutional distinction between the situation in which a parent makes out his tax return like all other taxpayers and gets back from the state a check for the amount of his children's tuition to a church school (tuition reimbursement) and one in which he simply deducts that amount from the amount of his completely unrelated tax liability (tax credit); nor between the latter and a situation such as in the instant case in which the state figures out for him what he has to deduct in his tax return to effectuate the tax credit (Chapter 414).

In its opinion in *Wolman v. Essex*, *supra*, the District Court said:

• • • While the ingenuity of man is apparently limitless, the Court has held with unvarying regularity that

¹¹ "The Collapse of Nonpublic Education: Rumor or Reality?" Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary Education, Vol. 1, pp. 1-6. It should be noted too that some of the 6.5% nonreligious schools may be profit making, and hence not within the coverage of Chapter 414.

¹² The District Court recognized this. Its discussion of this part of Chapter 414 begins with the sentence: "The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case." *Infra*, p. 32a.

one may not do by indirection what is forbidden directly; one may not by form alone contradict the substance of a transaction. (342 F. Supp. at 415)

We respectfully submit that this observation is no less applicable to the present case.

II. Severability

With practically no discussion, other than a citation of *Tilton v. Richardson*, *supra*, and *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 200, 234 (1932), the District Court held that Section 3 of the Act is separable from Sections 1 and 2. We respectfully suggest that Judge Hays' response is far more persuasive. He states (*infra*, pp. 45a-46a):

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.

As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature would not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). It is obvious that the New York state legislature would not have enacted section 3 bene-

fitting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

We add only that holding Section 3 inseverable from Section 2 (and Section 1) does not make the severability clause superfluous. It serves the important and we submit intended purpose of preserving parts 4 and 5 of the Act, the need for which is obviously predicated on the invalidation rather than the upholding of the other parts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction in the present case.

November 3,
Dated: ~~October 31~~, 1972

Respectfully submitted,

LEO PFEFFER

15 East 84th Street
New York, New York 10028
Attorney for Appellants

APPENDICES

APPENDICES

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APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of
New York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M.
DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA,
ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Intervenor-Defendant.

*Opinion of the District Court***Appearances:****LEO PFEFFER***Attorney for Plaintiffs*
New York, N. Y.**LOUIS J. LEFKOWITZ***Attorney General of the State of New York*
Attorney for Defendants
*Nyquist, Levitt and Gallman***By: RUTH KESSLER TOCH****JEAN M. COON,**
Of Counsel,
New York, N. Y.**DAVIS, POLK & WARDWELL***Attorneys for Intervenor-Defendants*
Boylan, Cherry, Ducey, Ferguson,
*Ferrarella, Roos and Ruiz***By: PORTER R. CHANDLER****RICHARD E. NOLAN,**
Of Counsel,
New York, N. Y.**JOHN F. HAGGERTY and****LOUIS P. CONTIGUGLIA***Attorneys for Intervenor-Defendant Brydges*
Senate Chamber
Albany, N. Y. 12224.**Before: HAYS, Circuit Judge, CANNELLA, District Judge**
and GURFEIN, District Judge.

Opinion of the District Court

GURFEIN, D.J.

We are again confronted with the question of the constitutionality of an Act of the New York Legislature relating to nonpublic schools, the children who attend them, and their parents. The plaintiffs are an unincorporated association and individuals who are residents of the State of New York and who pay income taxes and other taxes to that State. Some of the plaintiffs have children attending public schools. The defendants are the Commissioner of Education, the Comptroller and the Commissioner of Taxation and Finance of the State of New York.¹

Jurisdiction is alleged under United States Code, Title 28, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202. The amount in controversy, exclusive of interest and costs, is alleged to be in excess of \$10,000.

By consent of all parties, a motion to convene a three-judge court pursuant to Title 28, Sections 2281 and 2283, was granted, and this Court was convened.

The plaintiffs seek to enjoin the defendants from approving or paying any funds or according tax benefits as provided in the Act to be described. The State seeks a dismissal of the complaint on the merits but asserts no jurisdictional bar to maintenance of the action.

Since no trial has been had, the attack upon the several parts of the Act assumes that they are each facially unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution. The Act (N. Y. Laws of 1972, c. 414) is divided into five parts,

¹ Parents of children enrolled in nonpublic schools have been permitted to intervene as parties defendant. Similar permission was granted to Hon. Earl W. Brydges, Majority Leader and President *pro tempore* of the New York State Senate.

Opinion of the District Court

three of which are attacked by the plaintiffs as being in violation of the establishment clause which guarantees the separation of Church and State, as applied to the states by the Fourteenth Amendment.² These three parts of the statute which are under attack may be summarized as follows:

A. Section 1 provides for grants of money directly from the State Treasury to nonpublic schools for "maintenance" of the buildings if the nonpublic school has been designated during a base year as "serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C.A. §425)."³ If the school qualifies under the federal standard, it is to be given a direct grant of \$30 per pupil in attendance, which is increased to \$40 per pupil to those schools which are more than twenty-five years old.⁴ The grants, which are given directly to the particular nonpublic schools eligible for such grants, are to be in reimbursement of "maintenance and repair" costs incurred in the preceding year. "Maintenance and repair" is defined as "the provision of heat, light, water, ventilation and sanitary facili-

² The sections of the Act not under attack provide for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and provide for the purchase of nonpublic school buildings by public school districts where the nonpublic school has been closed (Sections 6-10).

³ 20 U.S.C. §425 deals with the partial forgiveness by the Federal Government of certain educational loans to students who become teachers in "a school in which there is a high concentration of students from low-income families," and provides a method for determining that criterion.

⁴ The amount of the grants is limited to "fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner."

Opinion of the District Court

ties, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner [the State Commissioner of Education] may deem necessary to ensure the health, welfare and safety of enrolled pupils." Each qualifying school which seeks an apportionment is required to submit to the Commissioner an application which shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

This part of the Act is entitled "Health and Safety Grants for Nonpublic School Children" and is prefaced by certain legislative findings. These recite that: (1) it is the primary responsibility of the state to ensure the health, welfare and safety of children attending both public and nonpublic schools; (2) "[f]inancial resources necessary to properly maintain and repair [deteriorating] buildings are beyond the capabilities of low-income people whose children attend nonpublic schools;" (3) teachers are given incentives by the Federal Government to teach in these poor areas; (4) healthy and safe nonpublic schools contribute to the stability of urban neighborhoods; and finally (5) "[t]o insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."⁵

⁵ Because of the suggestion that it was essential for the State to know promptly whether it could disburse the funds as provided in Section 1, we announced in a *per curiam* opinion our holding that this Section was in violation of the First Amendment as applied to the states by the Fourteenth Amendment. This opinion elaborates that decision.

Opinion of the District Court

B. Section 2 of the Act provides for flat tuition grants from the State Treasury to parents with family incomes of less than \$5,000 per annum who have children attending elementary or secondary nonpublic schools. The grant is in the sum of \$50 a year for children in grades 1 through 8, and \$100 in grades 9 through 12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent. The Commissioner is given "responsibility for the administration of the program" and is given authority to "promulgate such regulations as are necessary to carry out the provisions of this article." This section is entitled "Elementary and Secondary Education Opportunity Program."

Section 2 is prefaced by legislative findings that (1) "[t]he vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children"; (2) the Supreme Court of the United States has recognized this "right" of selection, but the "right" is diminished or denied to children of poor families whose parents have the least options in determining where their children are to be educated; (3) any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs which would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education; and (4) it is a legitimate purpose for the State to partially relieve the financial burdens of parents who provide a nonpublic education for their children.

C. Sections 3, 4 and 5 provide that an individual shall be entitled to subtract, for State income tax purposes, from

Opinion of the District Court

his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent.* This exclusion may be taken only by parents with adjusted gross incomes of from \$5,000 to \$25,000 who do not receive a tuition assistance payment under Section 2. The exclusion would be as much as \$1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers apparently

* The table is as follows:

<i>If New York adjusted gross income is:</i>	<i>The amount allowable for each dependent is:</i>
Less than \$9,000	\$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	-0-

Estimated Net Benefit to Family

<i>One Child</i>	<i>Two Children</i>	<i>Three or more</i>
\$50.00	\$100.00	\$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

Opinion of the District Court

as shown in note 6, *supra*. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

This part of the Act is prefaced by legislative findings (§3) that (1) statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions; (2) nonpublic educational institutions are entitled to a tax exempt status by virtue of legislation which has been sustained by the courts; (3) by their existence, such educational institutions relieve the taxpayers of the State of the burden of providing public school education for the children who attend nonpublic schools; (4) tax laws also authorize deductions for education related to employment; and (5) similar modifications of Federal adjusted gross income should also be provided to parents for tuition paid to nonpublic schools.

We have stated the legislative findings offered in support of each part of the statute in detail because we wish to make it clear that we accept these findings, except where they purport to state principles of applicable constitutional law. They sum up legislative purposes which are cast as secular in intent. Thus, we must start with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption that the Legislature intended to provide a quality education for all children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption

Opinion of the District Court

that the Legislature intended to provide a quality education for all children and to nurture a pluralistic society by giving money from the State Treasury to poor parents for tuition in nonpublic schools. And lastly we must assume that taxpayers as a body have, indeed, been relieved up to now of the burden of providing public school education for the children who attend nonpublic schools.

In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support. If that is constitutionally permissible, it is a worthy objective and one that should not be lightly set aside in the alleged interest of public education. Both public and nonpublic education can exist side by side. Neutrality forbids discrimination in favor of one system over the other.

Whether the main reason for this *legislative* concern is the fear that an intolerable financial burden will be cast upon the public schools if the nonpublic schools do go under, or whether the main reason is the survival of religious education, is not the particular *judicial* concern. We must weigh not only the purpose of the legislation but its effect on the traditional separation of Church and State in this country. As to the former, we accept the legislative statements. As to effect, we must exercise the judicial function of interpreting what effect the legislation will have upon areas protected from invasion by the constitutional guaranty.

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This is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their rights to the free exercise of religion. The other group, equally dedicated, believes that encroachment of Government in aid of religion is as dangerous to the secular state as encroachment of Government to restrict religion would be to its free exercise. Since the policy of separating Church from State is not merely one of policy but of constitutional provision, the ultimate determination of such conflicts must rest in the judicial branch. And the judges must be especially careful in this delicate area not to allow their personal predilections on policy to circumscribe their judgment as to the constitutional effect of particular legislative proposals. We must make a constitutional decision between these two worthy objectives. Yet, as an inferior federal court, we are not permitted to view the religion clauses of the First Amendment in a literal or even in an historical fashion. We have only to determine their meaning as authoritatively expounded by the Supreme Court. We shall, therefore, discuss the constitutionality of each of the three parts of the statute under the guidelines laid down by the Supreme Court, as we understand them.

I

The findings of the Legislature in respect of the needs of parochial schools in low income areas must, as we have said, be accepted as fact. For us to delve into the reasons why parochial education is stratified by the boundaries of richer or poorer districts would be improper, for that would be

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trenching on the prerogatives of religious denominations which must determine their own priorities and administration without State interference under the Free Exercise Clause of the First Amendment, as well as under the negative implications of the Establishment Clause. It is not to be gainsaid that slum-area parochial schools do have financial troubles. The issue is whether it is constitutional for the State to maintain them. Of the estimated 280 schools in the low income areas, which the Legislature seeks to help, all or practically all, it was conceded upon the argument, are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree. It is at this point that we must pause to review the history of the Establishment Clause in the courts in the light of the respective contentions of the parties.

The First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)), provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

In *Everson v. Board of Education*, 330 U.S. 1, the Supreme Court was for the first time required to determine what was "an establishment of religion" in the First Amendment's conception (see *id.* at 29). It was there recognized by all the Justices that not simply an established church, but any law respecting an establishment of religion is forbidden and that schools teaching religion come within the scope of the clause prohibiting the "establishment of religion."¹ The precise issue in that case, upon which the

¹ *Id.* at 15 (Black, J.), see *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).

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Court divided five to four, was the constitutionality of a New Jersey statute which allowed reimbursement of parents for the bus fares of children attending parochial schools as well as public schools; the particular provision was held constitutional. In view of the broad meaning attributed to the Establishment Clause by all the Justices, it is instructive to consider the limitations set upon their own decision by a majority of the Court. In the words of Mr. Justice Black for the majority, the "establishment of religion" clause "means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 15-16. Nor is the prohibition only against a tax *levy* to support religious teaching. It is also against *using* tax-raised funds for that purpose. Mr. Justice Black wrote: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment *contribute* tax-raised funds to the support of an institution which teaches the tenets and faith of any church" (emphasis added).

The majority of the Supreme Court did conclude, nevertheless, that the reimbursement of bus fares to parents was public welfare legislation, and that New Jersey could not be prohibited from extending its general state law benefits to all its citizens without regard to their religious beliefs. But the Court was careful to note in support of its decision that "[t]he State contributes no money to the schools. It does not support them." 330 U.S. at 18.

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The general language, however, did not remove the delicacy or the difficulty of the issues raised in succeeding cases. For we are a nation which recognizes value in religion but seeks to maintain neutrality in that sphere. Neutrality is not merely a state of mind, however. Neutrality inevitably means a relationship to religion, one way or another. And thus the Court formulated a two-fold test for sustaining legislation alleged to violate the Establishment Clause: There must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *School District v. Schempp*, 374 U.S. 203, 222 (1963). The Court recognized that this test "is not easy to apply," but that a law which "merely makes available to all children the benefits of a general [New York State] program to lend school books free of charge" is not in violation of the Establishment Clause. *Board of Education v. Allen*, 392 U.S. 236, 243 (1968). This decision brought forth three dissents, as well as a concurrence by Mr. Justice Harlan on the limited ground that the statute there involved "does not employ religion as its standard for action or inaction" *Id.* at 250.

The bifurcated test of intent and effect was again accepted in *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), a case to which we shall advert later. Furthermore, to the two tests was added a third, that the statute must not involve an "excessive entanglement" with religion. *Id.*

Yet, the issue of direct financial grant to parochial schools had not yet confronted the Court. Last year, such an issue was finally presented in the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This case is not only the most recent, but the most closely in point to the question of direct grants to primary and secondary parochial schools under Section 1

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of the statute before us, as is *Tilton v. Richardson*, 403 U.S. 672, decided the same day.

The *Lemon* case involved legislative grants as supplements to teachers' salaries in parochial schools in Pennsylvania and Rhode Island. The Rhode Island statute contained a legislative finding that the quality of education available in nonpublic elementary schools was jeopardized by the rising salaries needed to attract teachers, and authorized state officials to supplement the salaries of teachers of secular subjects in those schools by direct limited payment to the teacher, who was to teach only subjects taught in the public schools and no courses in religion. The Pennsylvania statute contained a legislative finding of rapidly rising costs in the State's nonpublic schools, and authorized reimbursement by the State to nonpublic schools of actual expenses for teachers' salaries, text books and instructional materials only in teaching secular subjects, and expressly excluded religious teaching.

Each statute, it will be seen, makes a distinction between that function of the parochial school which teaches secular subjects and that function which teaches religion, and stresses that state aid is not to be given for religious teaching. However, both the Pennsylvania and the Rhode Island statutes were struck down by the Supreme Court as violative of the Establishment Clause.

The opinion by the Chief Justice chose to hold the state legislation in violation of the Establishment Clause on the third of the three tests—excessive entanglement. This excessive entanglement was found to be of two kinds—administrative and political. The latter was based upon the prediction that continuing financial pressures on the

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nonpublic schools would, because of the annual nature of appropriations, generate considerable and recurring political activity to increase state aid, and that such activity would be along religious lines.

This choice of tests avoided the necessity to decide whether in *all* cases direct aid would be unconstitutional. But there is no indication, in our view, that the primary effect test, as a separate test, has been abandoned. And so far as precedent is concerned, the only direct aid to church-related institutions thus far sustained by the Supreme Court has been aid to hospitals, *Bradfield v. Roberts*, 175 U.S. 291 (1899) and the colleges in *Tilton*, where religious indoctrination was not a substantial purpose or activity of the church-related institutions. Nor was there any overruling in *Lemon* of various statements of the Justices that direct subsidy which aids schools with a religious mission would be unconstitutional. The striking down in *Tilton* of the provision inferentially permitting use of the buildings after twenty years for religious purposes, on the contrary, appears to bring such a subsidy within the primary effect test, without regard to the excessive entanglement test. *Tilton* is discussed more fully below.

While the opinions of the Justices who wrote separately supporting the result in *Lemon* differ in reasoning, the quintessence of what was held may, perhaps, be gleaned from the sole dissenting opinion, that of Mr. Justice White. 403 U.S. at 662. He stated the issue in the following terms: "Both the United States and the States urge that if parents choose to have their children receive instruction in the required secular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or

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all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school. The issue is fairly joined." Mr. Justice White relied strongly on the Free Exercise Clause to support his dissent, a view also urged upon us. But the rest of the Court refused to consider the conceded constitutional right of a parent to send his child to a parochial school as sufficient to sustain the public subsidy by the States in the face of the Establishment Clause. And Mr. Justice White himself made it clear that his dissent in the Rhode Island case was based upon findings of the District Court, which he maintained were ignored by the majority; and in the Pennsylvania case, he dissented only from the holding that the statute was *facially* unconstitutional.

It is important, because of the varied reasoning of the majority, to note what Mr. Justice White, as well, considered to be unconstitutional, and then to compare that formulation with the issue before us. Mr. Justice White explained:

"As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in

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the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional." 403 U.S. 671 n.2.

In the case at bar, we are dealing largely with the same parochial school system that was before this Court in *Committee for Public Education and Religious Liberty v. Levitt and Nyquist*, 342 F. Supp. 439 (S.D.N.Y. April 27, 1972). The answers to interrogatories made there established that New York State construed as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7) There seems to be no dispute that the statute here is also intended to apply to such schools.*

* The plurality opinion in *Tilton, infra*, by the Chief Justice makes it clear that the plurality were convinced that, with respect to the four colleges there involved, "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities." 403 U.S. at 687. On the other hand, aid to primary and secondary parochial schools is supported in New York on the very ground that parents have the right to choose parochial school education for their children as an important incident to their free exercise of religion, which includes the right to provide for religious indoctrination of the children through the parochial school.

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In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court held, five to four, that payments could be made under the Higher Education Facilities Act of 1963 to certain church-related *colleges* under one-time Federal construction grants for college facilities excluding "any *facility* used or to be used for sectarian instruction or as a place for religious worship or . . . primarily in connection with any part of the program of a school or department of divinity" (emphasis added). The Act permitted the Government to recover the funds granted within twenty years, if the restrictions on use of the building for religious teaching were not met. While sustaining the payments, the Court held unanimously that limiting the right of the Government to recapture the payment if the building should be used for religious purposes *after* twenty years was unconstitutional. It was accepted that the use of public funds for the construction of a building to be used for the teaching of religion was facially unconstitutional. Again, Mr. Justice White, while suggesting that the Court in *Tilton* was ruling that payments made directly to a religious institution are, without more, not forbidden by the First Amendment, 403 U.S. at 664, nevertheless concurred in the Court's invalidation of the provision whereby the restriction on the use for religious purposes of buildings constructed with Federal funds terminates after twenty years, 403 U.S. 665 n.1. The line drawn, it seems to us, is that while an entirely separate building of a church-related college, in no way related to the teaching of religion or the housing of worship, may receive public funds, it may not receive such funds from the moment when secular and religious teaching or prayer are mixed in the same building.

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Moreover, a direct grant to the parochial school is not the same as an across-the-board payment to parents of parochial school children which advances the common good as distinguished from religious good, and which equalizes the burden of the nonpublic school parent. The majority by Mr. Justice White in *Allen, supra*, pointed out the distinction: "Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S. at 243-44. Mr. Chief Justice Burger, in *Lemon*, noted that "the Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church related schools." 403 U.S. at 621. He distinguished *Everson* and *Allen* on the very ground that there state aid was provided to the student and his parents—not to the church related school. And he noted that in *Walz* the Court had warned of the dangers of direct payments to religious organizations. *Id.*⁹

In Mr. Justice Brennan's view, "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz v. Tax Commission, supra*, 397 U.S. at 690.

⁹ The impact of *Lemon* and *Tilton* on direct cash payments is suggested by two memorandum decisions filed on the same day. The Court vacated and remanded, for consideration in the light of *Lemon* and *Tilton*, *Kervick v. Clayton* and *Hunt v. McNair*, 403 U.S. 945 (1971). *Kervick* had upheld construction loans under the New Jersey Educational Facilities Authority Law, 56 N.J. 523, 267 A 2d 503 (1970). *Hunt* had upheld the issuance of bonds to pay off the indebtedness of a Baptist College under the Educational Facilities Authority Act, 255 S.C. 71, 177 S.E. 2d 362 (1970).

The Supreme Court of New Jersey, after the remand, held valid the statute which creates an Educational Facilities Authority to sell bonds and lend the proceeds to educational institutions, without

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This view is supported by history. The New York State Constitution provides in Article XI, §3:

“Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.”

Fewer than a half-dozen states omit such a provision. See 403 U.S. 647, n.6. While the ultimate decision in the *Tilton* case prohibited a grant for construction of a building used for religious teaching (even after twenty years), the Constitution of New York itself prohibits the granting of such funds for “maintenance,” the very objective of Section 1 of the statute we are considering. While it is not our purpose to determine constitutionality under the New York Constitution—a matter reserved for the State courts

pledging the credit of the State. *Clayton v. Kervick*, 59 N.J. 583, 285 A. 2d 11 (1971). But it concluded that even with respect to loans, as distinguished from grants, a facility may not be used for sectarian instruction or as a place of religious worship even after repayment of the loans; and no college may participate if it restricts entry on racial or religious grounds or requires all students gaining admission to receive instruction in the tenets of a particular faith. *Id.* at 20-21.

The Supreme Court of South Carolina also upheld its loan statute which provided that the facilities involved shall not be used for sectarian instruction. *Hunt v. McNair*, 187 S.E. 2d 645, 652 (1972).

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—we cannot avoid being impressed, in our consideration of the guidelines of the Supreme Court, by the almost unanimous views of the states as expressed in their respective constitutions adopted by the people.

The argument is made, however, that since janitorial functions and snow removal obviously are not the teaching of religion, their neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury. The argument is bottomed on the assumption that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction. Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion. If it be argued that the subsidy would go only to the needy parochial school which has no surplus to apportion, the short answer is, of course, that such a parochial school would have more than it has now, for it does now pay from its present budget for janitor services and heat.¹⁰

¹⁰ The State urges upon us for consideration some language of Chief Justice Burger in *Tilton, supra*, to the effect that "[c]onstruction grants surely aid these institutions [the church-related colleges] in the sense that the construction of buildings will assist them to perform their various functions." 403 U.S. at 679. The State notes that this form of governmental assistance was upheld.

Taking it in its literal sense the argument from the language is a fair one. But the quoted language must be read in the light of the Chief Justice's actual holding that use of the buildings for religious purposes, even after twenty years, was unconstitutional.

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The vice, moreover, is not only that the school budget as such is indivisible, but that no effort is made in this part of the statute to distinguish between secular and religious education. The janitorial service embraces cleaning the chapel, where there is one, and heat is provided to the classrooms where religion is taught. There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom. Cf. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).¹¹

Nor is the aid provided, though neutral in the sense of direct religious activity, given to any but a small class of institutions, almost all Roman Catholic, in deprived areas. It provides direct support for the maintenance of schools which teach religion.

Moreover, as Chief Justice Burger said in *Walz, supra*, "Obviously a direct money subsidy would be a relationship pregnant with involvement," 397 U.S. at 675. The "involvement" includes the inevitable auditing of reports of expenditures for maintenance and repair which surely must include the right of the State to determine the fairness of the charges made. The determination must be made

¹¹ The Supreme Court of Wisconsin recently held to be in violation of the Establishment Clause of the First Amendment a statute which authorized the contracting for purchase of dental education by the University [Marquette] dental school because it permitted the use of funds paid under the contract "in support of the operating costs" of the university without limiting the use of such funds exclusively to the providing of dental education in the dental school of the university. *State ex rel. Warren v. Busbaum* (State No. 266, July 7, 1972). This result was reached even though the Court recognized that the very nature of dental education assures the completely secular nature of the teaching of dentistry.

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whether the expenditures were, in fact, commensurate with the amount of the grant under the formula.

And the very percentage formula (\$30 or \$40 per pupil out of the entire tuition), honestly intended to avoid use of the subsidy for religious purposes, inevitably requires an assessment of how much of the education supplied is secular and how much religious. It is argued that the Legislature was careful to allow only fifty per cent of the actual costs of "maintenance and repair," as a maximum, and that this is assurance that the maintenance grant is not for religious teaching. But the very argument invites considerations of the percentage relationship of secular to religious teaching and the relative impact of religious indoctrination. The *Tilton* approach is not possible where the school to be benefited is not merely church-related but is itself part of the religious mission. If the Legislature is to be asked to determine formulas based on religious teaching *vel non*, it invites the very excessive entanglement we were instructed to avoid in the *Lemon* case.

If public subsidy for janitorial service and heat to needy nonpublic schools is allowed, we may ask whether the next step will not be to supply desks and blackboards and ultimately part of a building on a percentage basis, on the ground that these are not religious in character. Would it not then be argued that where a building is in serious disrepair it is better not to patch it up but to build a new building with public funds on the ground that such would be a health and welfare grant?

Nor is the argument based on the police power of the State convincing. Education is as much an important function within the police power of a State as are health and

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safety. See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The conflict of the First Amendment with the police power has been made apparent in the constitutional decisions affecting educational activity by the states. Almost any legitimate activity, except the teaching or preaching of religion itself, can be said to be within some element of police power of the State. Yet, a State law enacted in the exercise of otherwise undoubted State power may not prevail against Federal law. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). State power, as we have been instructed, cannot, in this area, leap the constitutional barrier when it uses direct, special subsidy as the means to implement such power.

The political pressures on the Legislature are bound to be strong along religious lines. As the Chief Justice said in *Lemon*: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." 403 U.S. at 623.¹²

To summarize our reluctant conclusion that we cannot sustain a direct public subsidy for the "maintenance and repair" of religious schools under the guidelines of the

¹² The brief of Senator Brydges argues that "[i]t is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its [sic] debates" (p. 37). We think that the Supreme Court, in its emphasis on "excessive entanglement" did not intend to limit legislative debate, but rather to strike down legislation which would encourage future divisive debate on religious lines. Whether this constitutional test should be modified is not within the province of this District Court. The argument can be made only to the Supreme Court.

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Supreme Court, our points of departure with the argument of the State of New York are that: (1) "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach* or practice religion." *Everson, supra*, 330 U.S. at 16 (emphasis added). We think *Tilton* does not overrule the application of the dictum to the case at bar. (2) The statute involved, though concentrating on schools in deprived areas, makes no distinction between secular and religious teaching, and tax-raised funds are directly used for the maintenance of buildings which teach religion. (3) We cannot accept the view that, under present doctrine, budgets for churches, synagogues or parochial schools can be made divisible by ascribing a percentage of cost to neutral functions. (4) On the contrary, we interpret the dictum of the Supreme Court that neutral services may be afforded to parochial schools to mean simply that general services, such as transportation, secular books, free lunches and, perhaps, athletic training, visiting nurses and the like, afforded to students in *all* schools may also be made available to students in parochial schools. (5) We think that, unlike the one-time construction of new buildings as in *Tilton*, the "maintenance and repair" provisions of the New York statute involve "continuing financial" and political "relationships [and] dependencies." *Tilton, supra*, 403 U.S. at 688.¹³

In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within

¹³ It must be noted that the colleges involved in *Tilton* were not directly controlled by the church; the elementary and secondary schools covered by the New York statute are controlled by a religious hierarchy.

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the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both.

II.

Section 2 of the statute provides for partial reimbursement to needy parents for the tuition they pay to send their children to parochial schools. Although the payment is to the parent, by hypothesis he is within a low annual income bracket (below \$5,000) which would make it possible that he could not afford to send his children to parochial school in the absence of a direct subsidy from the State Treasury. Indeed, it is the very assumption of the Legislature in its findings that he will use the money grant for tuition. Whether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance. The recipient is the parochial school. The source is the State tax-derived money. The parent is simply a conduit. See *Griffin v. County School Board*, 377 U.S. 218 (1964); *Griffin v. State Board of Education*, 239 F. Supp. 560, 563 (E.D. Va. 1965), *overruled on other grounds*, 296 F. Supp. 1178 (E.D. Va. 1969); *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio 1972).

While in the general distribution of a State aid program, as in the case of reimbursement of bus transportation to parents (*Everson, supra*), the loan of text books to students (*Allen, supra*), free lunches to children and the like, there is a distinction between a grant to the family and a grant to the parochial school, there is no such distinction

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where the parent is a mere conduit for a payment of tuition. In the former, the costs assumed by the State were generally borne by the parents, in the first instance, and it is they who are being reimbursed, not the school. In the case of tuition, it is the school which benefits by getting tuitions from State funds which it might otherwise not receive.¹⁴

The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their "right" to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

¹⁴ Senator Brydges' brief argues as "history" (p. 16) that with respect to Section 3209 of the N.Y. Education Law, the New York Attorney General in 1935 ruled that it applied to children attending parochial schools as well as public schools. We agree that the affirmative duty of "public welfare officials" to furnish "indigent children with suitable clothing, shoes, books, food and other necessities to enable them to attend upon instruction as hereinbefore required by law" does not require the denial of these benefits to needy children who attend parochial schools. But there is nothing in that statute concerning the payment by the state of tuition for needy children. The Education Law involved a general grant to all which did not include tuition.

As to tuition, there may be situations where special circumstances make attendance at public schools impractical as in the case of orphan schools, see *Sargent v. Board of Education*, 177 N.Y. 317 (1904); Indian schools, Education Law, art. 83; and schools for deaf and blind children, *id.* art. 85. But those sections are not relevant to normal children who can attend the public schools.

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These are serious arguments that cannot be disregarded, particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society.

The propagation of religious doctrine was early made the responsibility of the particular denomination in hard times as well as good times. We know, however, that inflation was no concern of the framers of the First Amendment, and, as individuals, we sympathize with its victims. But a State-supported church school is simply not a part of our way of life, and the payment of tuition for its pupils makes the church school a State-supported school.¹⁵

¹⁵ In the language of Chief Judge Lord* in *Lemon v. Sloan*, 340 F.Supp. 1356, 1364 (E.D. Pa. 1972): "The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid those schools."

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While there can be no proof either way, it is possible that among persons eligible for the tuition grant there will be not only those who now have their children in a parochial school but also some whose children now attend the public schools and whom they would transfer to a parochial school.

The implications of recognizing a "right" to the support of public funds for the expression of the free exercise of religion are, moreover, staggering. Religious belief and the right to practice religion, including the teaching of the young, are precious rights to be preserved unto death itself. But a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment. If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca. These are all "rights" to the free exercise of religion that cannot be denied, and from the exercise of which the poor may be excluded by circumstance.

If the Founding Fathers had any intentions about religion, it was surely to separate the concern of the Government from the concern of the individual religious community. That is why we have the double-edged religion clauses of the First Amendment—no law respecting the establishment of religion *or* the free exercise thereof. Each sector must not only respect its own proper functions. Each must also support them. This appears to be the essence of the voluntarism requirement of the First Amend-

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ment; see Harlan, J., concurring in *Walz*, *supra*, 397 U.S. at 696.

The examples cited by the State to support its argument for tuition reimbursement to poor parents deal with the striking down of exactions by the State of money from the poor as a condition to their exercise of particular constitutional rights, like the right to sue in the courts for divorce without paying court costs, *Boddie v. Connecticut*, 401 U.S. 371 (1971), and the right to vote without paying a poll tax, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). So, too, *Sherbert v. Verner*, 374 U.S. 398 (1963) held invalid the denial of unemployment benefits where the free exercise of religion was inhibited. The statute here, on the contrary, affirmatively establishes benefits for the free exercise of religion. No case has been cited where an affirmative cash subsidy to advance the constitutional right to the free exercise of religion was allowed.

Nor do we ignore the argument forcefully put by the State and by representatives of the able majority leader of the State Senate. The possible closing of Catholic parochial schools on a large scale would cast a heavy burden on an already overburdened State. But we must recognize, within the guidelines set by the Supreme Court, that economic hardship alone is not enough to overcome the strictures of the First Amendment. The Court in *Lemon*, *supra*, accepted the legislative findings of economic stringency in the parochial schools, with the obvious, if not fully articulated, potential effect on the State finances of Rhode Island and Pennsylvania. It, nevertheless, struck down what were clearly economic measures to help the fiscal condition of

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the nonpublic schools with the possible consequence of forced absorption of their burdens by the States.

The argument, like many good arguments, stretches the band to the breaking point. For it must be tested for validity against contingencies which could occur and which would have a strong effect on legislative action, not only because of religious pressures on the legislators, but because of the conviction that the public treasury has more to gain by supporting church schools directly than by not supporting them.

If conditions worsen, it would be proper, under this argument, to pay the salaries of the secular teachers. But that is what has just been invalidated by the Supreme Court. The argument would logically admit of circumstances, honestly based upon economic need, which would support the grant of public funds, at least for secular education, in geographic areas where there were not enough parochial schools, and where the pressure of population would otherwise cause great hardship to the neighborhood public schools. Once we embark upon such a course, we fear that the meaning of the Establishment Clause will be diluted to the point where the State will support the parochial schools with the inevitable control by the State built into an anomalous situation. That is a condition devoutly not to be wished. The proponents of this legislation will probably affirm that they are willing to take their chances on such an eventuality and that they would rather have the funds in hand. But it is the peculiar function of the judicial branch to remain unmoved by current desires, not in the sense of usurping the province of legislatures, but

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in viewing basic constitutional provisions as outliving the generation of men which has to interpret them.¹⁶

III.

The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools *in the State*. Second, it does not involve a subsidy or grant of money *from the State Treasury* as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because

¹⁶ (a) A similar conclusion was recently reached by a three-judge court in the Eastern District of Ohio. *Wolman v. Essex*, 342 F.Supp. 399 (E.D. Ohio 1972). There moneys had been appropriated for "educational grants to parents" and for the provision of neutral, non-religious "materials and services" for pupils attending nonpublic schools. The statute was held to be in violation of the Establishment Clause of the First Amendment.

(b) A Pennsylvania Act providing for reimbursement of tuition payments to parents whose children attend nonpublic schools was declared unconstitutional in spite of a legislative declaration that parents who send their children to nonpublic schools assist the State in reducing the rising cost of public education, and that if children now attending nonpublic schools were forced to transfer to public schools "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state." *Lemon v. Sloan*, *supra* at 1366 (three-judge court). Chief Judge Lord wrote: "If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so." *Id.* at 1365.

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of religious belief or otherwise, send their children to non-public full-time schools, as is their constitutional right. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the on-going political activity as likely, in our opinion, to cause division on strictly religious lines.

We shall explain our reasons briefly.

There has always been a sharp distinction in the history of the United States between direct grants of public funds to religious institutions, generally prohibited, and tax exemption for religious institutions, generally permitted. This indirect aid to religious institutions has largely taken two forms, exemption from local property taxes and the like, and income tax exemptions for contributions to religious institutions. The former method was lately before the Supreme Court in *Walz, supra*. The latter method has never been challenged in the Supreme Court. As the Court noted in *Walz*, the real property tax exemption provision for churches is two hundred years old. The acquiescence in the practice by the people, the historical absence of religious divisiveness, and the exemption's ancient origin were considered to lend support to its exclusion from the restraints of the religion clauses of the First Amendment.

In *Walz*, the Court recognized that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . ." 397 U.S. at 674; yet the New York statute granting to churches as well as other educa-

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tional and civic institutions exemption from real property taxes was sustained. The Court also noted in *Walz* that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

It certainly can be argued that if the power to tax is the power to destroy, the power not to tax is the power to support. The Supreme Court has not accepted that view, and has rejected the argument that exemptions do not differ from subsidies as a matter of economics.

Our distinguished colleague, Judge Hays, in his dissenting opinion assumes constitutional invalidity because the "purpose and effect of the statute [Part III] are . . . to subsidize religious training for children." Why, then, it may be asked, does not an income tax deduction for a contribution to a church "subsidize" religious worship for parents? If, indeed, "there is no essential difference between a parent's receiving a \$50 reimbursement for tuition paid to a parochial school and his receiving a \$50 benefit because he sends his child to a parochial school," then there should be no essential difference between a parent's receiving a \$50 "reimbursement" for a payment to his parish church and his receiving a \$50 "benefit" for the same payment. As Judge Hays states it, "in both instances the money involved represents a charge made upon the state for the purpose of religious education." With great respect, we paraphrase this to say that, in our illustration as well, it could be said that the money involved represents a charge made upon the State for the purpose of denominational worship. Yet we

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have abided this very condition in our taxing system for many years, although we know that some denominations conduct church-related Sunday Schools or even weekday afternoon classes in religion.

Whether the distinction is based on logic, history or simply on an authoritative guideline set by the Supreme Court, we may approach our difficult task with the distinction between subsidy and tax exemption in mind. It cannot be a perfect guide, for the statute involved in *Walz* gave real property tax exemption to a great many institutions, not only churches, there was no question of arbitrary classification, and alleged State involvement with religion was at least equivocal. On the other hand, in favor of its validity is the circumstance that under Section 3 of our statute, the income tax exemption (which is in effect a tax *credit* since the exemption is not intended to equal the parents' outlay) is to *individuals*, not to churches or church schools, a step removed. This kind of income tax relief, while not as old as property tax exemption because the constitutional income tax law itself is relatively modern, has been on the Federal statute books for more than half a century. It has been a consistent legislative policy ever since the 1917 Revenue Act for the Congress to permit the deduction of so-called charitable contributions from personal income.¹⁷ This has always included direct gifts to churches. The purpose is no doubt to encourage such contributions. 5 J. Mertens,

¹⁷ Revenue Act of 1917, c. 63, §1201(2), 40 Stat. 331. That statute allowed as a deduction, "[c]ontributions . . . made to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes."

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Law of Federal Income Taxation §31.01 (1969); *Bliss v. Commissioner*, 68 F. 2d 890 (2 Cir. 1934), *aff'd*, 293 U.S. 144 (1934).

We think that, aside from the "equal protection" problem which we do not pass upon, the credit against gross income of a fixed amount if tuition is paid to nonpublic schools, does not sponsor, or render forbidden financial support to church schools, at least in the limited form in which relief is given here. Credit is allowed not only to parents who pay tuition to a religious school but also to any nonprofit, nonpublic secular school. The table in the statute is geared roughly to the tax brackets and the rate of tax imposed on each bracket. The result ranges from a small, almost token, forgiveness to a family which attains an adjusted gross income of almost \$25,000 to a forgiveness roughly approximating the tuition cost of \$50 per child for a family in the lowest bracket. A memorandum prepared by Senator Brydges indicates that a family with three children in a nonpublic school would get a net benefit annually ranging from \$150 if the family has an adjusted gross income of less than \$9,000, to \$36 if the family has an adjusted gross income of \$24,999. The benefit is inverse to income. And we believe the Legislature has power to decide between allowing deductions and allowing credits.¹⁸

It seems to us unlikely, at least in the absence of strong proof, that a person having \$6,000 to \$9,000 per annum as an adjusted gross income would take his forgiveness or windfall, and hand it back to the parochial school as addi-

¹⁸ A deduction of \$150 for a person in a 6% tax bracket (\$7,000 to \$9,000) would have given him only a nine dollar benefit.

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tional tuition. He would, more likely, compensate himself for the tuition paid in an amount which would otherwise have gone to the State for income taxes. Thus, it is likely that while the State loses revenue, as it does generally in allowing charitable deductions, it does not aid the parochial school, as it may, indeed, do when it allows deductions for direct contributions to the church. If, in fact, persons in a somewhat higher bracket should forego the forgiveness and turn over the tax saving to the church, that would be a voluntary act, not different in kind from an ordinary church contribution. Indeed, it is to be hoped that at least part of the costs of educating poor children will come from this source.

Once we have hurdled the constitutional barrier to income tax benefit for contributions directly made to churches, as we believe we must, there is not much further to travel. It is true that the argument may be advanced as the dissenting opinion does that the parent receives a consideration in the education of his child, while there is no *quid pro quo* in a contribution to a church. And we understand that the Federal tax authorities do scrutinize contributions of parochial school parents with that yardstick. See *Fausner v. Commissioner*, 55 T.C. 620 (1971).

We are not dealing, however, with the interpretation of a revenue act but with an inquiry upon the limitations of the power of a State Legislature under the Federal Constitution. As a Court, we may not pass on questions of religious values or even adumbrate the moral or religious "consideration" that may accrue to the donor of a gift to the church of his choice.

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We put it more simply in practical terms. If a parishioner made a contribution to his parish, and the parish school were entirely free of tuition, would he be denied his income tax deduction because his child attended that school? Opinions may differ on the interpretation of present statutes, but it seems to us likely that an affirmative formulation by the Legislature would be constitutional.

We have not been asked to pass upon the constitutionality of part three on "equal protection" grounds, and we do not do so, cf. *Everson, supra*, 330 U.S. at 45." Putting such argument to one side, we think that the pressure on legislators to amend the income tax law is likely to be more from nonpublic school parents as a group rather than from parents of a single religious denomination. The principles of equity rather than of religious aid will probably be put to the fore if further liberalization by the Legislature is sought. And that we believe would not make for an inevitable excessive entanglement with religion in the legislative halls. As to administrative entanglement under part three of the statute, we see none beyond checking with the school simply to determine whether the tuition claimed to have been paid was actually paid.

We note, moreover, that the secular purpose as well as its effect is strong. The lightening of the tax burden of those who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary

¹⁰ There the Court refused to consider whether the apparent exclusion of "private schools run for profit" violates the Equal Protection Clause of the Fourteenth Amendment, because the statute was not challenged on that ground.

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choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute. 1 J. Mertens, *supra*, §4.09. As we have said, however, we do not now deal with the "equal protection" argument, the reasonableness of the classification by those standards, or whether there is an appropriate governmental interest suitably furthered by the different treatment. See *Police Department v. Mosley*, — U.S. —, 92 S. Ct. 2286 (1972).

We hold only that Section 3 of the statute is not in conflict with the First Amendment Establishment Clause, as applied to the states through the Fourteenth Amendment.

We also find Section 3 of the statute separable from the parts found to be unconstitutional. The statute itself contains a separability clause (§11). And we are not required to invalidate the entire Act. See *Tilton, supra*, 403 U.S. at 683-84; *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932).

A permanent injunction will be issued against the enforcement of Sections 1 and 2 of the statute. Judgment will be entered accordingly, pursuant to Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay. A permanent injunction against enforcement of Section 3 of the statute will be denied. The complaint so far as it relates to Section 3 of the statute, will not be dismissed, however. The parties may move for summary judgment or for an expedited trial.

An order will be settled on notice.

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The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Dated: October 2, 1972.

PAUL R. HAYS, *U. S. C. J.*
(Dissenting in part)

JOHN M. CANNELLA, *U. S. D. J.*
MURRAY I. GURFEIN, *U. S. D. J.*

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HAYS, *Circuit Judge*, in part concurring in the result; dissenting in part:

I am in agreement with the view of my colleagues that the part of the state statute (N.Y. Laws of 1972, c.414) providing for grants to private schools for the maintenance of buildings cannot survive a challenge based on the Establishment Clause and the cases decided under it. *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Bd. of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Education*, 330 U.S. 1 (1947). I agree with Judge Gurfein's view that the part of the statute providing for flat tuition grants to low-income parents is also unconstitutional. In addition to the cases previously cited see also *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio, 1972) (three judge court); *Lemon v. Sloan*, 340 F. Supp. 1356 (E.D. Pa., 1972) (three judge court). I therefore concur in the result reached by Judge Gurfein as to these aspects of the statute.

I dissent from the court's judgment concerning section 3 of the state act. I believe that that section, which provides for tax benefits with respect to tuition paid by the taxpayer for children attending religious schools, is also unconstitutional.

The purpose and effect of this provision of the statute are the same as the second portion, i.e., to subsidize religious training for children.¹ Both sections aim to reimburse

¹ Although section 3 is made applicable to parents whose children attend *any* nonprofit nonpublic school, the overwhelming majority of these parents are sending their children to religious schools where sectarian indoctrination takes place. According to the

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parents who have chosen to send their children to religious schools. As Mr. Justice Jackson said:

"The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination." *Everson v. Bd. of Education*, 330 U.S. at 24 (Jackson, J. dissenting).

And "[w]hat may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." *Abington School District v. Schempp*, 374 U.S. 203, 230 (Douglas, J. concurring).²

The benefits of the tax exemption allowed by section 3 are of the same nature as those accorded under the tuition reimbursement provisions of section 2. There is no essen-

Fleischman Commission report, religious schools make up 93.5% of New York State's *nonpublic* schools. The remaining 6.5% consist of both profit-making and nonprofit-making private schools. Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary Education, "The Collapse of Nonpublic Education: Rumor or Reality?", Vol. 1, pp. 1-6. See Transcript in *Pearl v. Nyquist*, p. 64. The profit-making schools are not, of course, covered by section 3.

² In the context of racial discrimination, grants to schools, students or their parents to avoid the commands of the Fourteenth Amendment have been consistently struck down. See *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La., 1961), *aff'd*, 368 U.S. 515 (1962); *Lee v. Macon County Bd.*, 267 F. Supp. 458 (M.D. Ala., 1967), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967); *Brown v. South Carolina State Bd.*, 96 F. Supp. 199 (D.S.C., 1968), *aff'd*, 393 U.S. 222 (1968); *Coffey v. State Educ. Finance Comm'n*, 296 F. Supp. 1389 (S.D. Miss., 1969).

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tial difference between a parent's receiving a \$50 reimbursement for tuition paid to a parochial school and his receiving a \$50 benefit because he sends his child to a parochial school. In both instances the money involved represents a charge made upon the state for the purpose of religious education.

The exemption of church property from ordinary taxation provides no analogy for the tax benefits of the present statute. The schools in the nonprofit nonpublic category in New York State are tax-exempt, N.Y. Real Prop. Tax Law §421 (1) (a) (McKinney Supp. 1971), and that status is not in dispute in this case. In *Walz v. Tax Commission*, supra, the Court believed nearly two centuries of acquiescence in and approval of such exemptions lent support to the proposition that the exemptions did not violate the Establishment Clause. 397 U.S. at 680. Moreover, the Court noted in *Walz* that the State had not "singled out one particular church or religious group or even churches as such; rather it [had] granted exemption to all houses of worship within a broad class of property owned by non-profit, quasi-public corporations" *Id.* at 673. Here, as the three judge panel pointed out in *Wolman v. Essex*, supra, "[t]he limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute." 342 F. Supp. at 412. Finally, the *Walz* court held (p. 674) that:

"Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

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The *Walz* decision, as the Court said in *Lemon v. Kurtzman*, supra, p. 614, "tended to confine rather than enlarge the area of permissible state involvement with religious institutions"

Nor does the present case concern the tax deductibility of religious contributions. Such contributions, even to church schools, are deductible under New York law, N.Y. Tax Law §360(10b) (McKinney 1966), and they would not be affected by the statute under scrutiny. Even assuming that tax deductions for contributions to religious schools are constitutional—a point not yet passed upon by the Supreme Court—we are not dealing with such deductions in the present case. A payment for services rendered is not a contribution, and such payments are not deductible. As the court said in *DeJong v. Commissioner*, 36 T.C. 896, 899-900 (1961), aff'd 309 F.2d 373 (9th Cir. 1962):

"We are satisfied on the record before us that at least a portion of the \$1,075 paid by petitioners to the society was in the nature of tuition fees for the education which the society was expected to furnish to petitioners' children and was not in fact a true charitable contribution. Payments pledged and made by parents in the circumstances disclosed by the evidence were not voluntary and gratuitous contributions motivated merely by the satisfaction which flows from the performance of a generous act; they were induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the society's school."

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See also *McLaughlin v. Commissioner*, 51 T.C. 233 (1968);
Fausner v. Commissioner, 55 T.C. 620 (1971).

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.^a

As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature could not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). It is obvious that the New York state legislature would not have

^aThe following table shows the estimated net benefits to taxpayers under section 3. The information is taken from the memorandum which accompanied the bill. It was submitted to each legislator by Senator Brydges and was cited by the majority of the p.

If Adjusted Gross Income is	Income Exclusion Per Pupil is	Estimated Net Benefit to Family		
		One child	Two children	Three or more
less than \$ 9,000	\$1,000	\$50.00	\$100.00	\$150.00
\$ 9,000 - 10,999	850	42.50	85.00	127.50
11,000 - 12,999	700	42.00	84.00	126.00
13,000 - 14,999	550	38.50	77.00	115.50
15,000 - 16,999	400	32.00	64.00	96.00
17,000 - 18,999	250	22.50	45.00	67.50
19,000 - 20,999	150	15.00	30.00	45.00
21,000 - 22,999	125	13.75	27.50	41.25
23,000 - 24,999	100	12.00	24.00	36.00
25,000 and over	0	0	0	0

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enacted section 3 benefiting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

For the foregoing reasons I respectfully dissent from the determination of the court as to the constitutionality of section 3.

APPENDIX B

Session Laws of New York

Education—Nonpublic Schools—Aid

CHAPTER 414

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, effective as provided in section 12.

Passed on message of necessity. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law § 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12—HEALTH AND SAFETY GRANTS FOR NONPUBLIC SCHOOL CHILDREN

Section

549. Legislative findings.

550. Definitions.

551. Apportionment.

552. Applications, reports, regulations.

553. Installments.

§ 549. Legislative findings

The legislature hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

2. The state discharges this responsibility to public school children through substantial amounts of per pupil financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

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3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five,¹ which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but none the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

¹ 20 U.S.C.A. § 1061 et seq.

§ 550. Definitions

In this article:

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d),¹ (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,² as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).

3. "Base year" shall mean the school year immediately preceding the current year.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.

5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session.

*Session Laws of New York***§ 551. Apportionment**

1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 552. Applications, reports, regulations

Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. Installments

The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of each year, except that for the school year commencing July first,

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payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A, to read as follows:

ARTICLE 12-A—ELEMENTARY AND SECONDARY
EDUCATION OPPORTUNITY PROGRAM

Section

559. Legislative findings.

560. Short title.

561. Definitions.

562. Tuition reimbursement payments to parents.

563. Commissioner; powers.

§ 559. Legislative findings

The legislature hereby finds and declares that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

3. Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.

4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.

5. An Elementary and Secondary Education Opportunity Program is hereby established which consists of tuition reimbursement for par-

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the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.

§ 560. Short title

This article shall be known as the "Elementary and Secondary Education Opportunity Program".

§ 561. Definitions

The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000(d),¹ and (iii) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,² as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar exclusive of July and August.

*Session Laws of New York***§ 562. Tuition reimbursement payments to parents**

1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit

*Session Laws of New York***§ 563. Commissioner; powers**

The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.

2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subsection (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to a nonpublic school for such education of such dependent. No tax-

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§ 562. Tuition reimbursement payments to parents

1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.

§ 563. Commissioner; powers

The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religions, charitable and educational institutions.

2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subsection (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this para-

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graph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

<u>If New York adjusted gross income is:</u>	<u>The amount allowable for each dependent is:</u>
<u>Less than \$9,000</u>	<u>\$1,000</u>
<u>9,000—10,999</u>	<u>850</u>
<u>11,000—12,999</u>	<u>700</u>
<u>13,000—14,999</u>	<u>550</u>
<u>15,000—16,999</u>	<u>400</u>
<u>17,000—18,999</u>	<u>250</u>
<u>19,000—20,999</u>	<u>150</u>
<u>21,000—22,999</u>	<u>125</u>
<u>23,000—24,999</u>	<u>100</u>
<u>25,000 and over</u>	<u>—0—</u>

(2) Husband and wife. In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

(3) Definitions. (A) "Tuition", as used in this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d) ¹ and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, ² as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state tax commission may require.

(C) "Regular school year", as used in this subsection, shall mean the months of the taxable year exclusive of July and August.

(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.

¹ 42 U.S.C.A. § 2000(d).

² 26 U.S.C.A. (I.R.C. 1954) § 501(c), (c) (3).

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§ 6. Legislative findings. The legislature hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils, the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps intolerable, fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

a. Definitions. As used herein:

1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school, during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.

2. borough shall mean any borough of the city school district of the city of New York.

3. aid ratio shall mean the higher of the actual aid ratio established for such district or borough, or thirty-six per centum.

b. Computation. The amount to be apportioned shall be the product of:

1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and

2. the aid ratio of such school district or borough.

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ratio for each such borough.

d. Any apportionment as herein computed shall be subject to regulations promulgated by the commissioner and shall not be deducted in

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determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year and the school year next succeeding such year.

§ 8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having been amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively, as follows:

1. No schoolhouse shall hereafter be erected, purchased, repaired, enlarged or remodeled in any school district except in a city school district in a city having seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specifications shall show in detail the ventilation, heating and lighting of such buildings.

In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may prescribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousand dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection or purchase of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exits upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection or purchase of any school building or addition thereto.

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or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of education shall not approve the plans for the erection or purchase of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment, accessibility; soil conditions; initial and ultimate cost.

§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for an appraisal of such buildings as school buildings, and the land on which they are situated¹ as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.

¹ So in original. Probably should read "situated".

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two hundred thirty-four of the laws of nineteen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, purchase of existing structures, for site purchase and improvement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs in-

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cidental to such construction or reconstruction, or purchase of existing structures.

a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction and the purchase of existing structures the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven through nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the costs of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction and the purchase of existing structures may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two, and the provisions of paragraph (14) of subsection (c) of section six hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.

APPENDIX C

Order and Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Order and Judgment

Plaintiffs' motion for the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2281, 2284 having come on to be heard on June 20, 1972 before the Hon. Murray Gurfein, United States District Judge, and the parties having conceded at that time that this action required the convening of a three-judge District Court, and Judge Gurfein having set the matter down for a hearing during the week of July 3, 1972 upon a representation that there were no factual issues involved; and the case having thereafter come on to be heard on the merits on July 6, 1972 before Judge Gurfein, the Hon. Paul R. Hays, United States Circuit Judge, and the Hon. John M. Cannella, United States District Judge, and all parties having submitted briefs and presented oral argument; and the Court, after due deliberation, having concluded on July 21, 1972 that Section 1 of Chapter 414 of the 1972 Laws of New York is in violation of the Establishment Clause of the First Amendment to the United States Constitution, and the Court having set forth the reasons for this decision in an opinion dated October 2, 1972; and the Court having further concluded in its opinion of October 2, 1972 that Section 2 of Chapter 414 is unconstitutional and that Sections 3, 4 and 5 of Chapter 414 are not in violation of the Establishment Clause of the First Amendment, Judge Hays dissenting with respect to Sections 3, 4 and 5 of Chapter 414; and the Court having directed that judgment be entered, permanently enjoining enforcement of Sections 1 and 2 of Chapter 414; and the Court having further stated that the parties may move for summary judgment or for an expedited trial with respect to Section[s] 3 [and 4 and 5] of Chapter 414; and defendant and intervenor-defendants having duly moved for summary

Order and Judgment

judgment dismissing the complaint with respect to Sections 3, 4 and 5 of Chapter 414;

Now, upon all of the proceedings heretofore had herein, it is hereby

ORDERED, ADJUDGED AND DECREED that Section 1 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair; and it is further

ORDERED, ADJUDGED AND DECREED that Section 2 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of

Order and Judgment

any tuition payments heretofore or hereafter made to non public elementary and secondary schools; and it is further

ORDERED, ADJUDGED AND DECREED that Sections 3, 4 and 5 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York be, and it hereby is, granted; and it is further

ORDERED that the complaint, insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York, be, and it hereby is, dismissed.

Dated: New York, New York
October 20, 1972

PAUL R. HAYS, *U.S.C.J.*
JOHN M. CANNELLA, *U.S.D.J.*
MURRAY I. GURFEIN, *U.S.D.J.*

ENTERED:

10/20/72 JOHN LIVINGSTON
Clerk

APPENDIX D

**Notice of Appeal to the Supreme Court
of the United States**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Notice of Appeal to the Supreme Court of the United States

NOTICE IS HEREBY GIVEN that the plaintiffs herein appeal to the Supreme Court of the United States from that part of the final order and judgment entered in this action on October 20, 1972 which (a) declares that Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment of the United States Constitution; (b) granted defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the New York Laws of 1972; and (c) dismisses the complaint herein insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the New York Laws of 1972.

This appeal is taken pursuant to 28 U.S.C., Section 1253.

~~Dated: October 30, 1972~~
November 3,

LEO PFEFFER
Attorney for Plaintiffs

To:

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Notice of Appeal to the Supreme Court of the United States

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IN THE

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Supreme Court of the United States

OCTOBER TERM, 1972

MICHAEL RODAK, JR., CLERK

No. 72-753

SENATOR EARL W. BRYDGES, as Majority Leader
and President Pro Tem of the New York State Senate,

Appellant,

—against—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON and CHARLES H. SUMNER,

Appellees.

On Appeal from the United States District Court
for the Southern District of New York

**JURISDICTIONAL STATEMENT ON BEHALF OF
APPELLANT, SENATOR EARL W. BRYDGES**

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1882

The first of the year was a very dry one, and the weather was very hot. The crops were very poor, and the people were very poor. The government was very poor, and the people were very poor. The government was very poor, and the people were very poor.

The second of the year was a very dry one, and the weather was very hot. The crops were very poor, and the people were very poor. The government was very poor, and the people were very poor. The government was very poor, and the people were very poor.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No.

SENATOR EARL W. BRYDGES, as Majority Leader
and President Pro Tem of the New York State Senate,

Appellant,

—against—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON and CHARLES H. SUMNER,

Appellees.

On Appeal from the United States District Court
for the Southern District of New York

**JURISDICTIONAL STATEMENT ON BEHALF OF
APPELLANT, SENATOR EARL W. BRYDGES**

Appellant, Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate, appeals from so much of the judgment of the United States District Court for the Southern District of New York, entered on October 20, 1972, as declares that Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State violate the Establishment Clause of the First Amendment to the Constitution of the United States and permanently enjoins payments under said sections to poverty area nonpublic elementary and secondary schools for health, safety and welfare purposes or to the parents of low income nonpublic school children in payment for or in reimbursement of any tuition payments made by them to nonpublic elementary and secondary schools, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The decision of the District Court for the Southern District of New York on the motion to convene a three-judge District Court was granted on consent of all parties on June 20, 1972 and no opinion was written.

The opinion of the District Court enjoining payments under Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State was rendered on October 2, 1972 and is not as yet officially reported. It is attached hereto as Appendix A.

Jurisdiction

This suit was brought under 28 U.S.C. §§ 1331, 1343(3), 2281, 2283 and 2202 for a permanent injunction against the allocation of funds of the State of New York to

poverty area nonpublic schools for a portion of expenses incurred for compliance with State-promulgated health and safety maintenance standards and to parents of low income nonpublic school children in payment for or in reimbursement of tuition payments made to such schools. The judgment of the District Court was entered on October 20, 1972 (Appendix B hereto), and notice of appeal of Senator Earl W. Brydges, as intervenor-defendant in this action, was filed on November 17, 1972 (Appendix C hereto). The following most recent decisions sustain the jurisdiction of the Supreme Court to review judgment on direct appeal in this case: *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U. S. 602 (1971), and *Tilton v. Richardson*, 403 U. S. 672 (1971); *Levitt, et al. v. Committee for Public Education and Religious Liberty, et al.*, Docket Nos. 72-269, 72-270, 72-271, October Term—1972.

Questions Presented

Is the "Establishment Clause" of the First Amendment of the U. S. Constitution violated by those provisions of a 1972 New York State Legislative Program, which specifically assist poor parents in educating their children: (A) by partially paying state moneys for insuring that the nonpublic school buildings in low income Title IV areas housing poor elementary and secondary school children comply with certain minimum state required health and safety maintenance standards; and (B) by partially reimbursing poor parents for secular tuition payments to continue their children in nonpublic schools, especially when there are not sufficient public funds and buildings to house these nonpublic school children for a quality education in the public schools?

Statutes Involved

Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State, entitled, in part, "An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; . . ." which is set forth in Appendix D hereto.

Statement

Appellant, Senator Earl W. Brydges, is the Majority Leader and President Pro Tem of the New York State Senate.

On May 25, 1972, Appellees, allegedly taxpayers of New York State, instituted this suit in the United States District Court for the Southern District of New York, praying, *inter alia*, that defendants, Ewald B. Nyquist, Commissioner of Education, Arthur Levitt, Comptroller, and Norman Gallman, Commissioner of Taxation and Finance, of the State of New York, be permanently enjoined from approving or paying any funds pursuant to Chapter 414 of the 1972 Laws of New York State (Appendix B hereto) to partially alleviate the financial burden on low income parents for educating their children in nonpublic schools.

Parents of children enrolled in nonpublic schools, namely, Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr. and Adamina Ruiz, were permitted to intervene as parties defendant. Similar permission was granted to Appellant, Senator Earl W. Brydges, Majority Leader and President Pro Tem of the New York State Senate.

On June 20, 1972, a three-judge District Court consisting of Hon. Paul R. Hays, U. S. Circuit Judge; Hon. John M. Cannella and Hon. Murray I. Gurfein, U. S. District Judges, was duly constituted, pursuant to 28 U.S.C. §2281 and §2284, on consent of all parties. A hearing on the merits was held on July 6, 1972.

On October 2, 1972, Judge Gurfein handed down an opinion (Appendix A hereto), concurred in by Judge Cannella and Hayes, declaring, *inter alia*, that Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State (Appendix B hereto) violate the Establishment Clause of the First Amendment. The Court, in striking down Section 1 which provides health, safety and welfare grants for nonpublic schools in economically impoverished areas, reasoned, in part, as follows:

"In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both."

In striking down Section 2 of Chapter 414, which provides for partial reimbursement to poor parents for the secular tuition they pay to send their children to nonpublic schools, the Court recognized the secular purposes of this program and observed as follows:

"The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their 'right' to a parochial school education for their chil-

dren; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

"These are serious arguments that cannot be disregarded particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

"The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society."

On October 20, 1972, judgment was entered (Appendix B hereto) permanently enjoining the

"payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair"

and

"payment for or reimbursement of any tuition payments heretofore or hereafter made to non-public elementary and secondary schools."

Notice of appeal on behalf of Appellant, Senator Earl W. Brydges, from the foregoing judgment to this Court was filed on November 17, 1972, pursuant to 28 U.S.C. §2101.

THE QUESTIONS ARE SUBSTANTIAL

- I. The United States Constitution does not prevent the State from making educational appropriations benefiting poverty area and low income students in the nature of public welfare benefits.**

The nonpublic school aid program presented here for consideration is unique in that it is different from any other statute in the United States. It is specifically designed to partially assist low income and poverty area parents in their desire to educate their children in non-public schools and it is limited in scope to certain clearly defined geographical poverty areas and certain clearly defined low income levels. The Final Report of the President's Panel on Nonpublic Education (U. S. Gov. Print. Office, Stock No. 1780-1972) observed:

"Finally, it might be noted that some constitutional lawyers feel the time has come to challenge the denial of benefits to nonpublic school students on grounds that educational appropriations are public welfare benefits which should not be restricted by religious conditions. The challenge should be mounted."

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The instant statute was drafted with just such an observation in mind and this case, limited as it is to poverty areas and low income parents, brings an educational public welfare benefit program before this Court.

A. Legislative History of Chapter 414—Fiscal Crisis in New York State:

New York State legislators, representing all political viewpoints, are concerned not only about the 3.2 million pupils enrolled in our public schools but also about the 750,000 pupils enrolled in the State accredited nonpublic schools, where children are required by law to receive a secular education equivalent to that in the public schools.

Article XI, Section 1 of the New York State Constitution charges the Legislature with the responsibility for "... the maintenance and support of a system of free common schools, wherein all the children of this State may be educated." For the past several years the State Legislature has been confronted with a crisis in financing the education of all its children. During this period approximately 4 million pupils have been in attendance yearly in the public and nonpublic schools of the State.

The cost to the State of financing public education has risen to about \$2.5 billion in 1972-73, an increase of almost \$500,000,000 since 1969-70, while local school district contributions increased by a commensurate amount.

Approximately 750,000 children, 18% of all students, are currently attending State chartered and regulated nonpublic schools at practically no cost to the taxpayer. Greatly increased costs for parents at these nonpublic schools, coupled with the ruinous inflation of recent years and ever rising taxes to support government operations at all levels including education, threaten a precipitous

collapse of the nonpublic school system with catastrophic consequences on the public sector.

Particularly affected are city school districts often characterized by overcrowded and outdated school buildings, unsatisfactory pupil-teacher ratios and hampered by constitutional tax limits in raising funds for education. Indeed, most of these school districts have little tax margin remaining. The table below demonstrates the relationship between remaining property tax leeway, the number of nonpublic school children and the local amount from their major source of revenue that would be available to support an influx of nonpublic students into the public schools.

**PROPERTY TAX REVENUE REMAINING
UNDER CONSTITUTIONAL LIMITS FOR THE SUPPORT
OF EDUCATION IN SELECTED CITIES***

City	1971-1972 Property Tax Margin Remaining	1970-1971 Non- public Enrollment	<i>Amount avail- able per pupil at local level if all nonpublic pupils were transferred to public schools</i>
Albany	\$ 254,122	1,709	\$148.69
Albanyhampton	175,826	2,505	70.19
Buffalo	5,528,877	32,353	170.89
Chester	36,826	535	68.83
New York	1,400,187	399,615	3.50
Niagara Falls	1,118	3,430	.32
Rochester	2,835,858	14,986	189.23
Syracuse	3,798	9,640	.39
Troy	896,628	3,325	269.66
Utica	664,116	5,402	122.93
Watkins	—0—	9,946	—0—

* Table and informational data in this subdivision 2 are derived from 1972 New York State Commission on the Quality Cost and Financing of Education, Chapter V—Aid to Nonpublic Schools.

The above city school districts have within their geographic boundaries more than 60% of all nonpublic school pupils in New York State. It is readily demonstrated from the above Table that the ability of those school districts to finance even the local share of education costs (average of \$750 per pupil) would be well nigh impossible if these students should transfer in any substantial numbers. In fact, the Table demonstrates that even a small number of transfers in certain cities—New York City, Niagara Falls, Syracuse and Yonkers—could constitute financial disaster for those areas.

The average operating costs for each public school child in New York State is approximately \$1400 per year. The financial crises that would be precipitated by attempting to maintain this present per pupil expenditure, should there be a collapse of nonpublic education, would be of shocking proportions. Consider, for example, the over \$1 billion additional annual operating cost that would be necessary, and the estimated \$1.4 billion added expenditure necessary to finance capital structures capable of handling this influx of children. The enormity of such a fiscal nightmare can only be placed in perspective when one considers that this is \$600,000,000 more than the entire revenue currently generated by the New York State sales tax and would necessitate almost doubling the State income tax. Can a State which has balanced its current budget on *anticipated* Federal revenue sharing of \$400,000,000 and whose tax burden is among the highest in the country be expected to meet this added fiscal burden? Should local school districts relying on a regressive property tax, already at the confiscatory level, be asked to assume that burden? The answer to the Legislature was obvious. Survival of quality education was at stake.

Most severely threatened were the inner city poverty area schools. This was the case because the parents of the children attending the nonpublic schools in these areas were either impoverished or of such low income standing that they were unable to contribute to the maintenance and operation of the nonpublic schools. Of particular significance was the additional fact that in these inner city areas the public schools were already undersized and overcrowded and incapable of accepting any further influx of students (cf., *Nebraska State Bd. of Educ., et al. v. School District of Hartington, etc.*, 188 Neb. 1 (1971), cert. den. Supreme Court Docket No. 71-1537 (October 16, 1972).

Thus the New York State Legislature responded, by overwhelming pluralities in both houses, with a program of aid to nonpublic schools in poverty areas and assistance to low income parents.

The law provides for a broad-based program to insure the quality of education of all children within the State during this period of extreme fiscal crises. It encompasses a multi-faceted aid program designed to insure the health, safety and welfare of children attending schools in impoverished areas; and a program of financial grants to parents of low income status, to enable all parents, not just the wealthy, to continue to educate their children in nonpublic schools and to avoid any precipitous school closings which would necessarily endanger the quality of education in the public schools.

B. Analysis of Sections 1 and 2 of Chapter 414.

(1) Section 1—The Health, Safety and Welfare Grants

To insure the health, safety and welfare of nonpublic school children, grants for maintenance and repair pro-

grams are provided for nonpublic schools in urban areas which serve high concentrations of students from low income families. These schools are designated by the U. S. Office of Education upon the recommendation of the New York Commissioner of Education and the local school superintendent pursuant to Title IV of the Federal Higher Education Act.

The basic grant is \$30 per pupil, which is increased by \$10 for children receiving instruction in school buildings over 25 years old. The grants, sent directly to the schools, are to be applied only for such health, safety and welfare purposes as heat, custodial services, ventilation, fire protection, lights, safety devices, etc. The schools must annually account for the proper expenditure of funds. In no event can the total payment to a nonpublic school for such services exceed one-half of the actual costs of such comparable services in the public schools. Approximately 280 nonpublic schools, of a total of 2,000 nonpublic schools, containing a total enrollment of 100,000 students will be eligible.

(2) Section 2—Tuition Reimbursement for Low Income Parents

The Court has long recognized the right of individual parents to select a school other than public for the education of their children (See, *Pierce v. Society of Sisters*, 268 U. S. 510 (1925)). This right, however, is diminished or even denied to children of lower income families, whose parents, of all groups, have the least options in determining where their children are to be educated. This section would provide partial assistance in meeting the financial burden of low income families in supporting the compulsory education of their children who are full time students in New York nonpublic elementary and secondary schools.

The Act establishes an elementary and secondary education opportunity program which would provide direct reimbursement payments for children from low income families who attend nonpublic schools.

Eligible parents are those with net taxable incomes of under \$5,000 a year. The payments, made directly to the parents, would amount to \$50 per calendar year for each child in grade levels one through eight and \$100 for children in grade levels nine through twelve. Payments would be reduced for months in which a child is not enrolled in the nonpublic school. The tuition reimbursement cannot exceed 50% of the actual tuition payments made by the parent.

A similar measure was recommended on April 20, 1972 for enactment on a Federal level by President Nixon's Panel on Nonpublic Education. (See, *Final Report of the President's Panel on Nonpublic Education*, supra.) The Panel is a sub-committee of the "blue ribbon" group of educators, lawyers and fiscal experts who constitute the President's Commission on School Finance.

C. Prior Decision of This Court Interpreting the "Establishment Clause":

Until *Everson v. Board of Education*, 330 U. S. 1 (1947) the prohibition of the "establishment clause", of the First Amendment as it applied to State action had not received this Court's review.

As a consequence, it is only necessary to review the limited number of recent Supreme Court decisions involving education aid programs to develop an outline of the kinds of meaningful aid to nonpublic education which have not been found to violate the First Amendment.

There are three principal decisions of this Court from which the constitutional limitations may be deduced.

In *Everson v. Board of Education*, supra, this Court sustained a state-financed program of bus transportation for students attending all schools including church-related. In its opinion this Court emphasized the public purpose which was being performed, saying:

"It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." (*Everson*, 330 U. S. 1, 7).

Twenty years later in *Board of Education v. Allen*, 392 U. S. 236 (1968), this Court sustained a state-financed program of loan of secular textbooks to students in all schools, including those that are church-related. In the majority opinion, Justice White suggested some of the guidelines for judging constitutional permissibility of other programs, saying:

"Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." (*Allen*, 392 U. S. 236, 243).

The third decision to deal with the issue of education aid was *Lemon v. Kurtzman, et al.*, 403 U. S. 602 (1971) with its related cases of *Earley v. DiCenso*, and *Robinson v. DiCenso*, as well as *Tilton v. Richardson*, 403 U. S. 672 (1971).

Unlike the two prior decisions upholding aid, the *Lemon* decision, supra, held that programs to subsidize teachers' salaries in church related schools were unconstitutional.

Just as we have said that *Everson* and *Allen* were limited to permitting buses and textbooks, respectively, so

do we find that *Lemon* is limited to outlawing direct payment of teachers' salaries. These are the narrow court holdings for which we must account carefully in any analysis.

Lemon did not deal with other programs, yet unfashioned, which take the form of scholar awards, parent grants, vouchers, tuition grants, tax credits, tax deductions, or an educational public welfare program as herein presented.

The narrow decision in *Lemon* must not foreclose us from the consideration of other possible and permissible routes of programming. Certainly it is the task of the state legislatures with the guidance of this Court to evolve the boundaries of constitutional permissibility.

(1) *Secular Neutral or Nonideological Services, Facilities, or Materials:*

In the majority opinion in *Lemon*, Justice Burger suggests that there are significant areas of assistance which are permissible under the First Amendment. He states:

"Our decisions from *Everson* to *Allen* have permitted the State to provide church-related schools with secular, neutral or nonideological services, facilities or materials." (*Lemon*, 403 U. S. 602 at 616 (1971)).

It is of special significance that Justice Burger paraphrases this language in *Tilton v. Richardson*, 403 U. S. 672 (1971), decided the same day, in which grants for building costs at church-related colleges were upheld. There this court said:

"The entanglement between church and State is also lessened here by the nonideological character of the

aid which the government provides. Our cases from *Everson* to *Allen* have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities or materials that are supplied to all students regardless of the affiliation of the school which they attend." (*Tilton*, 403 U. S. at 687).

It would appear that by this language this Court did not foreclose a program of limited aid to nonpublic schools in poverty areas in the nature of health, safety and welfare grants.

(2) *State Aid to the Student and His Parents—Not to the Church-Related School:*

The majority opinion in *Lemon* made a fundamental distinction between direct money grants and programs of so-called secular and neutral services, as are discussed above.

With respect to direct money grants this Court emphasized that payment to a church-related school was impermissible *where excessive entanglement was required*. In so stating, the Court went on to say:

"This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that State aid was provided to the student and his parents—not to the church-related school." (403 U. S. at 621)

It was this criteria which was expressed by Mr. Justice White in *Allen*, *supra*, when he emphasized that in that case no funds or books were furnished to parochial schools, and the financial benefit provided is to the parents and children, and not to the schools.

Even Justice Douglas, who presented a strong dissent in the *Allen* case, seemed to concede the validity of child and parent benefit legislation when he stated:

"There is nothing ideological about a school lunch, a public nurse, or a *scholarship*." (390 U. S. 257, emphasis added)

A welfare benefit program of limited reimbursement to low-income parents would seem to avoid the excessive entanglement issue and be permissible in that the aid is "provided to the student and his parents—not to the church related school."

Thus, this Court has recognized that the First Amendment does not create an absolute prohibition against any form of State financial assistance to religious institutions. It is noted in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) that rather than forming a "wall of separation" between Church and State, the First Amendment is a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

The Court observed:

"Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contracts." (403 U. S. at 614)

D. Constitutionality of Health, Safety and Welfare Grants:

In the *Lemon* case this Court acknowledges that States do have a legitimate interest under their police powers to insure the health, safety and welfare of children in nonpublic schools.

In recognition of this permissible area of legislation, the New York State Legislature provided for grants in aid to nonpublic schools located within impoverished areas. Notably, the children benefiting from such grants attend only schools where teachers, including teachers in nonpublic schools, are entitled to partial forgiveness of repayment of Federal educational loans. Such loan relief is afforded under Title IV of the Federal Higher Educational Act of 1965 to induce teachers to instruct in impoverished areas.

To insure that the State payments are applied solely for the health, safety and welfare of children attending such schools, an annual accounting is required. As additional assurance of the secularity of the program, in no event can the total payment to a nonpublic school for such services exceed one-half the actual costs of such comparable services in the public schools.

Significantly, no portion of such State grants can be applied towards teachers' salaries. Accordingly, no danger exists as to "excessive governmental entanglement" wherein the public sector might dictate the character of instruction in parochial schools. Certainly, this fear was a major reason for this Court's rejection of the Secular Educational Services Act, which subsidized teachers' salaries, in the *Lemon* case.

E. Constitutionality of Tuition Reimbursement Grants— Ohio and Pennsylvania Plans Distinguished:

Recent decisions have invalidated two state plans for providing tuition reimbursements to parents whose children attend nonpublic schools (*Wolman v. Essex*, 342 F. Supp. 399 (E. D. Ohio 1972), aff'd. 41 Law Week 3167 (10-10-72); *Lemon v. Sloan*, 346 F. Supp. 1356 (E. D. Pa. 1972), U. S. Sup. Ct., Docket No. 72-459) An analysis of those states statute demonstrates that these invalidated plans are distinguishable in many significant aspects from the poverty area/low income assistance plan of New York.

(1) Ohio Plan distinguished (*Wolman v. Essex*, 342 F. Supp. 399 (E. D. Ohio 1972), aff'd. 41 Law Week 3167 (10-10-72))

The major joints of distinction between the Ohio Tuition reimbursement plan and the New York plan are as follows:

a) Method of Payment encourages excessive entanglement

The Ohio plan provides for state aid payments to local school districts which in turn make tuition reimbursement payments to eligible parents. Such procedure engenders excessive religious entanglement with public officials at local community levels. The New York statute provides for direct payment by the State Commissioner of Education to the applying parent.

b) Uncertain amount of payment

The Ohio tuition reimbursement payments were fixed at \$90 for the first year and then left to the determination

of the Commissioner of Education in future years. On its face, such procedure invites ongoing political entanglement. The New York tuition reimbursement payments are fixed by statute.

c) Tuition, Reimbursement Payments Not Limited to Secular Purposes

Under the Ohio plan, a parent could be reimbursed 100% of the tuition paid for his child. In such instances, a portion of the State payment would represent aid for religious instruction. The New York statute provides for a maximum 50% reimbursement, or in other words a Statistical Guarantee of Neutrality. In New York 30% of the total cost of education in nonpublic schools is paid by tuition, the remainder is derived through voluntary contributions, endowments and the like. The maximum tuition reimbursement by the State is thus only 15% of educational costs in the nonpublic schools. Therefore, in no instance could it be persuasively argued that New York's tuition reimbursement payment supports any religious teaching whatsoever, since the compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses.

d) Tuition reimbursement payments not limited to low-income families

In not restricting the tuition reimbursement payments to low-income families, the Ohio plan was not an educational welfare benefit plan, and was not responsive to the particular financial plight of the low-income parent. The New York plan is solely geared for and restricted to low-income families.

e) Tuition reimbursement payments not responsive to costs of tuition

The nonpublic schools in Ohio instituted a tuition program just prior to enactment of the Ohio plan, thus raising the specter that the plan was a subterfuge to channel monies directly to nonpublic schools. The New York plan, on the other hand, is responsive to a long-established tuition program for the support of nonpublic schools. Its only purpose is to allow low income parents to participate in such nonpublic schools.

(2) *Pennsylvania Plan Distinguished (Lemon v. Sloan, 346 F. Supp. 1356 (E. D. Pa., 1972), U. S. Supreme Court Docket No. 72-459)*

The Pennsylvania tuition reimbursement plan bore many of the same infirmities as the Ohio plan. The Pennsylvania statute failed to restrict the amount of tuition reimbursement to less than 100% of tuition paid and also did not restrict the payments to low-income families. Of equal significance was the absence of any requirement that the parent had paid the tuition for his child. He was entitled to an immediate tuition reimbursement payment by merely promising to pay his child's tuition. Such a scheme is naturally fraught with unconstitutional problems.

The New York plan, on the other hand, provides reimbursement only on proof of actual payment of tuition and only following completion of the school year and it is limited to a maximum of 50% of the total tuition paid.

II. The Federal District Court in this case erroneously applied the decisions of this Court in the landmark decisions of *Everson*, *Allen*, *Walz*, *Lemon* and *Tilton*.

A. Federal District Court's Ruling on the Unconstitutionality of Health, Safety and Welfare Grants.

It is submitted that the Federal District Court in this case erroneously applied the *ratio decidendi* in the landmark cases of *Everson v. Board of Education*, *supra*, *Board of Education v. Allen*, *supra*, *Lemon v. Kurtzman*, *supra*, *Walz v. Tax Commission*, 397 U. S. 690 (1970) and *Tilton v. Richardson*, *supra*, in arriving at its conclusion that the health, safety and welfare grants violate the First Amendment. The Court acknowledged that the "primary purpose" test met constitutional muster—i.e., that the Legislature's intent to maintain a quality education for students in economically impoverished areas was a legitimate legislative purpose. The Court argued, however, that such grants violated the "primary effect" test and the "excessive entanglement" test as enunciated by this Court. In concluding that the "primary effect" test was violated, the District Court reasoned that, although the grants are for such secular functions as janitorial, heating and light, the buildings in which such functions are performed may also be used for religious instruction. Ergo, the grants aid religion.

Overlooked by the Federal District Court are the statements by this Court in *Lemon*, *supra*, 403 U. S., at 611 in which this Court implies that the true import of the "primary effect" test is not whether a religious institution derives *some* benefit from the program, but rather that "... neither advances nor inhibits religion." Moreover, on the same day *Lemon* was decided, this Court acknowledged that

... "bus transportation, textbooks and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld . . . The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion . . ."—*Tilton, supra*, 403 U. S. at 679. See also *Walz, supra*, 397 U. S. at 671-672.

In order to determine what factors distinguish permissible from prohibited aid, it is necessary to review briefly this Court's decisions which have considered forms of aid to church-related schools under the "primary effect" test. In *Everson, supra*, this Court upheld a statute which authorized the use of tax-raised funds to reimburse parents for the costs of transporting students to and from public and private schools. This Court held that the state could extend the benefits of public welfare legislation to all citizens despite the fact that such aid helped children to get to church-related schools and that there was the possibility that some children might not have been sent to church-related schools if their parents were required to pay transportation costs. This Court found that the purpose and effect of the law was to promote general public welfare by helping parents get their children safely to and from accredited schools. This Court concluded that the First Amendment does not require that the state cut off sectarian schools from general services "so separate and so indisputably marked off from the religious function." *Everson, supra*, 330 U.S.C. at 18.

In failing to come to grips with these guidelines, the Federal District Court in our case summarily dismissed

important safeguards contained in Chapter 414 of the New York law which insure that the general services furnished the nonpublic schools are separately and indisputably marked off from the religious function.

A "statistical guarantee of neutrality" is assured in the payment of the health, safety and welfare grants by the proviso that in no instance can such payments exceed one-half of the cost of like services furnished to public schools—an arithmetic computation presently ascertainable under New York State educational aid programs. Moreover, the requirement that nonpublic schools furnish an independent annual audit of the application of such grants, further assures that the funds are separately and indisputably marked off from the religious mission. Certainly these legislative safeguards afford reasonable assurance that the grants of public funds are limited to secular functions.

Nor do such reasonable safeguards violate the "excessive entanglement" test, as the Federal District Court implies. This Court in *Lemon* has recognized the necessity of public "entanglement" in religion when essential to enforce building and fire regulations affecting nonpublic schools. Any entanglement incidental to reviewing a private audit of the application of health and safety grants can scarcely be characterized as excessive. To be sure, long-standing programs of entanglement, such as requiring nonpublic schools to prepare and submit to the State daily attendance requirements and to administer scholastic achievement tests to satisfy State minimum educational requirements, entail much more excessive entanglement than would flow from the State's administration of a program of health, safety and welfare grants for the relatively small number of 280 nonpublic schools located in economically impoverished areas of the State.

B. Federal District Court's Ruling on the Unconstitutionality of Tuition Reimbursement Payments.

The Federal District Court likewise overlooked the important features of New York State's tuition reimbursement program, which insure that the payments are secular. Like transportation aid, tuition reimbursement payments are tantamount to the extension of the benefits of public welfare legislation to needy citizens despite the fact that such aid helps children to get to church-related schools and that there is the possibility that some children might not be sent to church-related schools if their parents were required to pay such costs.

In addition, limiting the tuition reimbursement payments to no more than 50% of the actual tuition paid by the parent for his child insures that such reimbursement is not for the costs of instruction in religion. One cannot persuasively argue that over 50% of the tuition expenses of a child in nonpublic schools are for religious instruction, especially since tuition represented only 30% of the educational costs in nonpublic schools.

Equally nonpersuasive is the argument posed by the Federal District Court that "[i]f State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a Crucifix or a Torah . . ." etc. The flaw in that argument obviously lies in the fact that the law does not compel people to go to church, while it does compel a parent to send his child to a school (while, in addition, compelling the parent to pay for the support of public schools).

III. Legislative bodies and political institutions should not be curtailed in their Constitutional right to a free and open debate of issues touching on religion.

The exercise of such fundamental rights as Freedom of Speech and Expression and the reserved sovereign powers of the states are endangered by the opinion of the Federal District Court in this case. In declaring unconstitutional Section 1 of Chapter 414 of the 1972 Laws of New York State, the Court implied that the Establishment Clause of the First Amendment was breached since this legislation . . . "would encourage future divisive debate on religious lines". The Court stated that "The political pressures on the Legislature are bound to be strong along religious lines." As authority for this proposition, the Federal District Court relied on the statements of this Court in *Lemon, supra*, 403 U. S. at 623.

Traditionally, state legislative bodies and other political institutions have exercised the right to free and open debate of any subject or issue no matter how politically divisive it may be on segments of our society.

It is submitted that "political divisiveness" should not be relied on as a basis for curtailing legislative debate and enactment of legislation respecting issues of a religious nature. Judicial adherence to such a concept may well lead to the resolution of peculiarly volatile social, political and economic issues outside the framework of our democratic process in a manner that is "extra-legal".

The narrow decision in *Lemon* must not foreclose state legislatures from the consideration of other possible and permissible routes of programming non-public school aid. Certainly it is the task of the state legislatures with the guidance of this Court to evolve the boundaries of constitutional permissibility.

CONCLUSION

It is in the interest of the State of New York to insure that all children regardless of race, color, religion, national origin, income level or poverty background are educated to their fullest potential. It would not be in New York State's best interest to require that all children attend public schools. Such a requirement would mean that an additional 750,000 children (approximately 18% of the total State public and nonpublic school enrollment) would move into the public school system at an operational cost of \$1400 per pupil, plus capital costs.

Many of the public schools and especially the ones in the poverty areas are already overcrowded, and an influx of any substantial number of nonpublic school children would compound current adverse pupil-teacher ratio problems. Such an influx would cost the State of New York and local school districts over \$1 billion each year in additional operating costs alone. This would aggravate the existing financial crisis in education to a breaking point.

There are other benefits flowing from the availability of nonpublic school education. These benefits include diversity in education, competition in education stimulating progress, experimentation and innovation in non-governmental schools, pluralism, prevention of State monopoly in education, freedom of education, and freedom of thought. New York State has a fine public school education, and it is essential that it continues to exist and flourish. However, a monopolized education is not the way to accomplish this goal. (See, *Minnersville School District v. Gobitis*, 310 U. S. 598-599 (1939)).

We contend that the decision of the District Court in this case fails to recognize the authority of the several states, under our Federal System, to legislate with re-

spect to nonpublic school education. It would appear that the District Court opinion is a blind adherence to the rhetoric of the *Lemon* decision without any perceptive analysis of the particular form of limited aid advanced by New York to poverty area schools and low income parents.

It is submitted that the New York program of partial, and limited and restricted health, safety and welfare assistance to poverty area nonpublic schools and its related program of partial tuition reimbursement assistance limited solely and specifically to low income parents is consistent with and in response to permissible constitutional guidelines set forth by this Court and the United States Constitution.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Dated: November 20, 1972

Respectfully submitted,

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APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
 BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
 THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
 ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
 BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
 ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
 DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
 and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
 State of New York, ARTHUR LEVITT, as Comptroller of
 the State of New York, and NORMAN GALLMAN, as Com-
 missioner of Taxation and Finance of the State of
 New York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M.
 DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA,
 ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
 President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Opinion of the District Court

Appearances:

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JOHN F. HAGGERTY and

LOUIS P. CONTIGUGLIA

Attorneys for Intervenor-Defendant Brydges
Senate Chamber
Albany, N. Y. 12224.

Before: HAYS, Circuit Judge, CANNELLA, District Judge
and GURFEIN, District Judge.

Opinion of the District Court

MURFEIN, D.J.

We are again confronted with the question of the constitutionality of an Act of the New York Legislature relating to nonpublic schools, the children who attend them, and their parents. The plaintiffs are an unincorporated association and individuals who are residents of the State of New York and who pay income taxes and other taxes to that State. Some of the plaintiffs have children attending public schools. The defendants are the Commissioner of Education, the Comptroller and the Commissioner of Taxation and Finance of the State of New York.¹

Jurisdiction is alleged under United States Code, Title 28, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202. The amount in controversy, exclusive of interest and costs, is alleged to be in excess of \$10,000.

By consent of all parties, a motion to convene a three-judge court pursuant to Title 28, Sections 2281 and 2283, was granted, and this Court was convened.

The plaintiffs seek to enjoin the defendants from applying or paying any funds or according tax benefits as provided in the Act to be described. The State seeks a dismissal of the complaint on the merits but asserts no jurisdictional bar to maintenance of the action.

Since no trial has been had, the attack upon the several provisions of the Act assumes that they are each facially unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution. The Act (N.Y. Laws of 1972, c. 414) is divided into five parts,

Parents of children enrolled in nonpublic schools have been permitted to intervene as parties defendant. Similar permission was granted to Hon. Earl W. Brydges, Majority Leader and President pro tempore of the New York State Senate.

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three of which are attacked by the plaintiffs as being in violation of the establishment clause which guarantees the separation of Church and State, as applied to the states by the Fourteenth Amendment.² These three parts of the statute which are under attack may be summarized as follows:

A. Section 1 provides for grants of money directly from the State Treasury to nonpublic schools for "maintenance" of the buildings if the nonpublic school has been designated during a base year as "serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C.A. §425)."³ If the school qualifies under the federal standard, it is to be given a direct grant of \$30 per pupil in attendance, which is increased to \$40 per pupil to those schools which are more than twenty-five years old.⁴ The grants, which are given directly to the particular nonpublic schools eligible for such grants, are to be in reimbursement of "maintenance and repair" costs incurred in the preceding year. "Maintenance and repair" is defined as "the provision of heat, light, water, ventilation and sanitary facili-

² The sections of the Act not under attack provide for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and provide for the purchase of nonpublic school buildings by public school districts where the nonpublic school has been closed (Sections 6-10).

³ 20 U.S.C. §425 deals with the partial forgiveness by the Federal Government of certain educational loans to students who become teachers in "a school in which there is a high concentration of students from low-income families," and provides a method for determining that criterion.

⁴ The amount of the grants is limited to "fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner."

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ties, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner [the State Commissioner of Education] may deem necessary to ensure the health, welfare and safety of enrolled pupils." Each qualifying school which seeks an apportionment is required to submit to the Commissioner an application which shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

This part of the Act is entitled "Health and Safety Grants for Nonpublic School Children" and is prefaced by certain legislative findings. These recite that: (1) it is the primary responsibility of the state to ensure the health, welfare and safety of children attending both public and nonpublic schools; (2) "[f]inancial resources necessary to properly maintain and repair [deteriorating] buildings are beyond the capabilities of low-income people whose children attend nonpublic schools;" (3) teachers are given incentives by the Federal Government to teach in these poor areas; (4) healthy and safe nonpublic schools contribute to the stability of urban neighborhoods; and finally (5) "[t]o insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."

¹ Because of the suggestion that it was essential for the State to know promptly whether it could disburse the funds as provided in Section 1, we announced in a *per curiam* opinion our holding that this Section was in violation of the First Amendment as applied to the states by the Fourteenth Amendment. This opinion elaborates that decision.

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B. Section 2 of the Act provides for flat tuition grants from the State Treasury to parents with family incomes of less than \$5,000 per annum who have children attending elementary or secondary nonpublic schools. The grant is in the sum of \$50 a year for children in grades 1 through 8, and \$100 in grades 9 through 12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent. The Commissioner is given "responsibility for the administration of the program" and is given authority to "promulgate such regulations as are necessary to carry out the provisions of this article." This section is entitled "Elementary and Secondary Education Opportunity Program."

Section 2 is prefaced by legislative findings that (1) "[t]he vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children"; (2) the Supreme Court of the United States has recognized this "right" of selection, but the "right" is diminished or denied to children of poor families whose parents have the least options in determining where their children are to be educated; (3) any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs which would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education; and (4) it is a legitimate purpose for the State to partially relieve the financial burdens of parents who provide a nonpublic education for their children.

C. Sections 3, 4 and 5 provide that an individual shall be entitled to subtract, for State income tax purposes, from

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his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent.* This exclusion may be taken only by parents with adjusted gross incomes of from \$5,000 to \$25,000 who do not receive a tuition assistance payment under Section 2. The exclusion would be as much as \$1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers apparently

* The table is as follows:

*If New York adjusted
gross income is:*

*The amount allowable
for each dependent is:*

Less than \$9,000	\$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	-0-

Estimated Net Benefit to Family

<i>One Child</i>	<i>Two Children</i>	<i>Three or more</i>
\$50.00	\$100.00	\$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

Opinion of the District Court

as shown in note 6, *supra*. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

This part of the Act is prefaced by legislative findings (§3) that (1) statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions; (2) nonpublic educational institutions are entitled to a tax exempt status by virtue of legislation which has been sustained by the courts; (3) by their existence, such educational institutions relieve the taxpayers of the State of the burden of providing public school education for the children who attend nonpublic schools; (4) tax laws also authorize deductions for education related to employment; and (5) similar modifications of Federal adjusted gross income should also be provided to parents for tuition paid to nonpublic schools.

We have stated the legislative findings offered in support of each part of the statute in detail because we wish to make it clear that we accept these findings, except where they purport to state principles of applicable constitutional law. They sum up legislative purposes which are cast as secular in intent. Thus, we must start with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption that the Legislature intended to provide a quality education for all children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption

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that the Legislature intended to provide a quality education for all children and to nurture a pluralistic society by giving money from the State Treasury to poor parents for tuition in nonpublic schools. And lastly we must assume that taxpayers as a body have, indeed, been relieved up to now of the burden of providing public school education for the children who attend nonpublic schools.

In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support. If that is constitutionally permissible, it is a worthy objective and one that should not be lightly set aside in the alleged interest of public education. Both public and nonpublic education can exist side by side. Neutrality forbids discrimination in favor of one system over the other.

Whether the main reason for this *legislative* concern is the fear that an intolerable financial burden will be cast upon the public schools if the nonpublic schools do go under, or whether the main reason is the survival of religious education, is not the particular *judicial* concern. We must weigh not only the purpose of the legislation but its effect on the traditional separation of Church and State in this country. As to the former, we accept the legislative statements. As to effect, we must exercise the judicial function of interpreting what effect the legislation will have upon areas protected from invasion by the constitutional guaranty.

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This is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their rights to the free exercise of religion. The other group, equally dedicated, believes that encroachment of Government in aid of religion is as dangerous to the secular state as encroachment of Government to restrict religion would be to its free exercise. Since the policy of separating Church from State is not merely one of policy but of constitutional provision, the ultimate determination of such conflicts must rest in the judicial branch. And the judges must be especially careful in this delicate area not to allow their personal predilections on policy to circumscribe their judgment as to the constitutional effect of particular legislative proposals. We must make a constitutional decision between these two worthy objectives. Yet, as an inferior federal court, we are not permitted to view the religion clauses of the First Amendment in a literal or even in an historical fashion. We have only to determine their meaning as authoritatively expounded by the Supreme Court. We shall, therefore, discuss the constitutionality of each of the three parts of the statute under the guidelines laid down by the Supreme Court, as we understand them.

I

The findings of the Legislature in respect of the needs of parochial schools in low income areas must, as we have said, be accepted as fact. For us to delve into the reasons why parochial education is stratified by the boundaries of richer or poorer districts would be improper, for that would be

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trenching on the prerogatives of religious denominations which must determine their own priorities and administration without State interference under the Free Exercise Clause of the First Amendment, as well as under the negative implications of the Establishment Clause. It is not to be gainsaid that slum-area parochial schools do have financial troubles. The issue is whether it is constitutional for the State to maintain them. Of the estimated 280 schools in the low income areas, which the Legislature seeks to help, all or practically all, it was conceded upon the argument, are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree. It is at this point that we must pause to review the history of the Establishment Clause in the courts in the light of the respective contentions of the parties.

The First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)), provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

In *Everson v. Board of Education*, 330 U.S. 1, the Supreme Court was for the first time required to determine what was "an establishment of religion" in the First Amendment's conception (see *id.* at 29). It was there recognized by all the Justices that not simply an established church, but any law respecting an establishment of religion is forbidden and that schools teaching religion come within the scope of the clause prohibiting the "establishment of religion." The precise issue in that case, upon which the

¹ *Id.* at 15 (Black, J.), see *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).

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Court divided five to four, was the constitutionality of a New Jersey statute which allowed reimbursement of parents for the bus fares of children attending parochial schools as well as public schools; the particular provision was held constitutional. In view of the broad meaning attributed to the Establishment Clause by all the Justices, it is instructive to consider the limitations set upon their own decision by a majority of the Court. In the words of Mr. Justice Black for the majority, the "establishment of religion" clause "means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 15-16. Nor is the prohibition only against a tax *levy* to support religious teaching. It is also against *using* tax-raised funds for that purpose. Mr. Justice Black wrote: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment *contribute* tax-raised funds to the support of an institution which teaches the tenets and faith of any church" (emphasis added).

The majority of the Supreme Court did conclude, nevertheless, that the reimbursement of bus fares to parents was public welfare legislation, and that New Jersey could not be prohibited from extending its general state law benefits to all its citizens without regard to their religious beliefs. But the Court was careful to note in support of its decision that "[t]he State contributes no money to the schools. It does not support them." 330 U.S. at 18.

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The general language, however, did not remove the delicacy or the difficulty of the issues raised in succeeding cases. For we are a nation which recognizes value in religion but seeks to maintain neutrality in that sphere. Neutrality is not merely a state of mind, however. Neutrality inevitably means a relationship to religion, one way or another. And thus the Court formulated a two-fold test for sustaining legislation alleged to violate the Establishment Clause: There must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *School District v. Schempp*, 374 U.S. 203, 222 (1963). The Court recognized that this test "is not easy to apply," but that a law which "merely makes available to all children the benefits of a general [New York State] program to lend school books free of charge" is not in violation of the Establishment Clause. *Board of Education v. Allen*, 392 U.S. 236, 243 (1968). This decision brought forth three dissents, as well as a concurrence by Mr. Justice Harlan on the limited ground that the statute there involved "does not employ religion as its standard for action or inaction" *Id.* at 250.

The bifurcated test of intent and effect was again accepted in *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), a case to which we shall advert later. Furthermore, to the two tests was added a third, that the statute must not involve an "excessive entanglement" with religion. *Id.*

Yet, the issue of direct financial grant to parochial schools had not yet confronted the Court. Last year, such an issue was finally presented in the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This case is not only the most recent, but the most closely in point to the question of direct grants to primary and secondary parochial schools under Section 1

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of the statute before us, as is *Tilton v. Richardson*, 403 U.S. 672, decided the same day.

The *Lemon* case involved legislative grants as supplements to teachers' salaries in parochial schools in Pennsylvania and Rhode Island. The Rhode Island statute contained a legislative finding that the quality of education available in nonpublic elementary schools was jeopardized by the rising salaries needed to attract teachers, and authorized state officials to supplement the salaries of teachers of secular subjects in those schools by direct limited payment to the teacher, who was to teach only subjects taught in the public schools and no courses in religion. The Pennsylvania statute contained a legislative finding of rapidly rising costs in the State's nonpublic schools, and authorized reimbursement by the State to nonpublic schools of actual expenses for teachers' salaries, text books and instructional materials only in teaching secular subjects, and expressly excluded religious teaching.

Each statute, it will be seen, makes a distinction between that function of the parochial school which teaches secular subjects and that function which teaches religion, and stresses that state aid is not to be given for religious teaching. However, both the Pennsylvania and the Rhode Island statutes were struck down by the Supreme Court as violative of the Establishment Clause.

The opinion by the Chief Justice chose to hold the state legislation in violation of the Establishment Clause on the third of the three tests—excessive entanglement. This excessive entanglement was found to be of two kinds—administrative and political. The latter was based upon the prediction that continuing financial pressures on the

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nonpublic schools would, because of the annual nature of appropriations, generate considerable and recurring political activity to increase state aid, and that such activity would be along religious lines.

This choice of tests avoided the necessity to decide whether in *all* cases direct aid would be unconstitutional. But there is no indication, in our view, that the primary effect test, as a separate test, has been abandoned. And so far as precedent is concerned, the only direct aid to church-related institutions thus far sustained by the Supreme Court has been aid to hospitals, *Bradfield v. Roberts*, 175 U.S. 291 (1899) and the colleges in *Tilton*, where religious indoctrination was not a substantial purpose or activity of the church-related institutions. Nor was there any overruling in *Lemon* of various statements of the Justices that direct subsidy which aids schools with a religious mission would be unconstitutional. The striking down in *Tilton* of the provision inferentially permitting use of the buildings after twenty years for religious purposes, on the contrary, appears to bring such a subsidy within the primary effect test, without regard to the excessive entanglement test. *Tilton* is discussed more fully below.

While the opinions of the Justices who wrote separately supporting the result in *Lemon* differ in reasoning, the quintessence of what was held may, perhaps, be gleaned from the sole dissenting opinion, that of Mr. Justice White. 403 U.S. at 662. He stated the issue in the following terms: "Both the United States and the States urge that if parents choose to have their children receive instruction in the required secular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or

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all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school. The issue is fairly joined." Mr. Justice White relied strongly on the Free Exercise Clause to support his dissent, a view also urged upon us. But the rest of the Court refused to consider the conceded constitutional right of a parent to send his child to a parochial school as sufficient to sustain the public subsidy by the States in the face of the Establishment Clause. And Mr. Justice White himself made it clear that his dissent in the Rhode Island case was based upon findings of the District Court, which he maintained were ignored by the majority; and in the Pennsylvania case, he dissented only from the holding that the statute was *facially* unconstitutional.

It is important, because of the varied reasoning of the majority, to note what Mr. Justice White, as well, considered to be unconstitutional, and then to compare that formulation with the issue before us. Mr. Justice White explained:

"As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in

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the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional." 403 U.S. 671 n.2.

In the case at bar, we are dealing largely with the same parochial school system that was before this Court in *Committee for Public Education and Religious Liberty v. Levitt and Nyquist*, 342 F. Supp. 439 (S.D.N.Y. April 27, 1972). The answers to interrogatories made there established that New York State construed as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7) There seems to be no dispute that the statute here is also intended to apply to such schools.*

*The plurality opinion in *Tilton*, *infra*, by the Chief Justice makes it clear that the plurality were convinced that, with respect to the four colleges there involved, "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities." 403 U.S. at 687. On the other hand, aid to primary and secondary parochial schools is supported in New York on the very ground that parents have the right to choose parochial school education for their children as an important incident to their free exercise of religion, which includes the right to provide for religious indoctrination of the children through the parochial school.

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In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court held, five to four, that payments could be made under the Higher Education Facilities Act of 1963 to certain church-related colleges under one-time Federal construction grants for college facilities excluding "any facility used or to be used for sectarian instruction or as a place for religious worship or . . . primarily in connection with any part of the program of a school or department of divinity" (emphasis added). The Act permitted the Government to recover the funds granted within twenty years, if the restrictions on use of the building for religious teaching were not met. While sustaining the payments, the Court held unanimously that limiting the right of the Government to recapture the payment if the building should be used for religious purposes *after* twenty years was unconstitutional. It was accepted that the use of public funds for the construction of a building to be used for the teaching of religion was facially unconstitutional. Again, Mr. Justice White, while suggesting that the Court in *Tilton* was ruling that payments made directly to a religious institution are, without more, not forbidden by the First Amendment, 403 U.S. at 664, nevertheless concurred in the Court's invalidation of the provision whereby the restriction on the use for religious purposes of buildings constructed with Federal funds terminates after twenty years, 403 U.S. 665 n.1. The line drawn, it seems to us, is that while an entirely separate building of a church-related college, in no way related to the teaching of religion or the housing of worship, may receive public funds, it may not receive such funds from the moment when secular and religious teaching or prayer are mixed in the same building.

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Moreover, a direct grant to the parochial school is not the same as an across-the-board payment to parents of parochial school children which advances the common good as distinguished from religious good, and which equalizes the burden of the nonpublic school parent. The majority by Mr. Justice White in *Allen, supra*, pointed out the distinction: "Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S. at 243-44. Mr. Chief Justice Burger, in *Lemon*, noted that "the Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church related schools." 403 U.S. at 621. He distinguished *Everson* and *Allen* on the very ground that there state aid was provided to the student and his parents—not to the church related school. And he noted that in *Walz* the Court had warned of the dangers of direct payments to religious organizations. *Id.**

In Mr. Justice Brennan's view, "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz v. Tax Commission, supra*, 397 U.S. at 690.

*The impact of *Lemon* and *Tilton* on direct cash payments is suggested by two memorandum decisions filed on the same day. The Court vacated and remanded, for consideration in the light of *Lemon* and *Tilton*, *Kervick v. Clayton* and *Hunt v. McNair*, 403 U.S. 945 (1971). *Kervick* had upheld construction loans under the New Jersey Educational Facilities Authority Law, 56 N.J. 523, 267 A 2d 503 (1970). *Hunt* had upheld the issuance of bonds to pay off the indebtedness of a Baptist College under the Educational Facilities Authority Act, 255 S.C. 71, 177 S.E. 2d 362 (1970).

The Supreme Court of New Jersey, after the remand, held valid the statute which creates an Educational Facilities Authority to sell bonds and lend the proceeds to educational institutions, without

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This view is supported by history. The New York State Constitution provides in Article XI, §3:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

Fewer than a half-dozen states omit such a provision. See 403 U.S. 647, n.6. While the ultimate decision in the *Tilton* case prohibited a grant for construction of a building used for religious teaching (even after twenty years), the Constitution of New York itself prohibits the granting of such funds for "maintenance," the very objective of Section 1 of the statute we are considering. While it is not our purpose to determine constitutionality under the New York Constitution—a matter reserved for the State courts

pledging the credit of the State. *Clayton v. Kerrick*, 59 N.J. 583, 285 A. 2d 11 (1971). But it concluded that even with respect to loans, as distinguished from grants, a facility may not be used for sectarian instruction or as a place of religious worship even after repayment of the loans; and no college may participate if it restricts entry on racial or religious grounds or requires all students gaining admission to receive instruction in the tenets of a particular faith. *Id.* at 20-21.

The Supreme Court of South Carolina also upheld its loan statute which provided that the facilities involved shall not be used for sectarian instruction. *Hunt v. McNair*, 187 S.E. 2d 645, 652 (1972).

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—we cannot avoid being impressed, in our consideration of the guidelines of the Supreme Court, by the almost unanimous views of the states as expressed in their respective constitutions adopted by the people.

The argument is made, however, that since janitorial functions and snow removal obviously are not the teaching of religion, their neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury. The argument is bottomed on the assumption that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction. Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion. If it be argued that the subsidy would go only to the needy parochial school which has no surplus to apportion, the short answer is, of course, that such a parochial school would have more than it has now, for it does now pay from its present budget for janitor services and heat.¹⁰

¹⁰ The State urges upon us for consideration some language of Chief Justice Burger in *Tilton, supra*, to the effect that "[c]onstruction grants surely aid these institutions [the church-related colleges] in the sense that the construction of buildings will assist them to perform their various functions." 403 U.S. at 679. The State notes that this form of governmental assistance was upheld.

Taking it in its literal sense the argument from the language is a fair one. But the quoted language must be read in the light of the Chief Justice's actual holding that use of the buildings for religious purposes, even after twenty years, was unconstitutional.

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The vice, moreover, is not only that the school budget as such is indivisible, but that no effort is made in this part of the statute to distinguish between secular and religious education. The janitorial service embraces cleaning the chapel, where there is one, and heat is provided to the classrooms where religion is taught. There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom. Cf. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).¹¹

Nor is the aid provided, though neutral in the sense of direct religious activity, given to any but a small class of institutions, almost all Roman Catholic, in deprived areas. It provides direct support for the maintenance of schools which teach religion.

Moreover, as Chief Justice Burger said in *Walz, supra*, "Obviously a direct money subsidy would be a relationship pregnant with involvement," 397 U.S. at 675. The "involvement" includes the inevitable auditing of reports of expenditures for maintenance and repair which surely must include the right of the State to determine the fairness of the charges made. The determination must be made

¹¹ The Supreme Court of Wisconsin recently held to be in violation of the Establishment Clause of the First Amendment a statute which authorized the contracting for purchase of dental education by the University [Marquette] dental school because it permitted the use of funds paid under the contract "in support of the operating costs" of the university without limiting the use of such funds exclusively to the providing of dental education in the dental school of the university. *State ex rel. Warren v. Busbaum* (State No. 266, July 7, 1972). This result was reached even though the Court recognized that the very nature of dental education assures the completely secular nature of the teaching of dentistry.

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whether the expenditures were, in fact, commensurate with the amount of the grant under the formula.

And the very percentage formula (\$30 or \$40 per pupil out of the entire tuition), honestly intended to avoid use of the subsidy for religious purposes, inevitably requires an assessment of how much of the education supplied is secular and how much religious. It is argued that the Legislature was careful to allow only fifty per cent of the actual costs of "maintenance and repair," as a maximum, and that this is assurance that the maintenance grant is not for religious teaching. But the very argument invites considerations of the percentage relationship of secular to religious teaching and the relative impact of religious indoctrination. The *Tilton* approach is not possible where the school to be benefited is not merely church-related but is itself part of the religious mission. If the Legislature is to be asked to determine formulas based on religious teaching *vel non*, it invites the very excessive entanglement we were instructed to avoid in the *Lemon* case.

If public subsidy for janitorial service and heat to needy nonpublic schools is allowed, we may ask whether the next step will not be to supply desks and blackboards and ultimately part of a building on a percentage basis, on the ground that these are not religious in character. Would it not then be argued that where a building is in serious disrepair it is better not to patch it up but to build a new building with public funds on the ground that such would be a health and welfare grant?

Nor is the argument based on the police power of the State convincing. Education is as much an important function within the police power of a State as are health and

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safety. See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The conflict of the First Amendment with the police power has been made apparent in the constitutional decisions affecting educational activity by the states. Almost any legitimate activity, except the teaching or preaching of religion itself, can be said to be within some element of police power of the State. Yet, a State law enacted in the exercise of otherwise undoubted State power may not prevail against Federal law. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). State power, as we have been instructed, cannot, in this area, leap the constitutional barrier when it uses direct, special subsidy as the means to implement such power.

The political pressures on the Legislature are bound to be strong along religious lines. As the Chief Justice said in *Lemon*: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." 403 U.S. at 623.¹²

To summarize our reluctant conclusion that we cannot sustain a direct public subsidy for the "maintenance and repair" of religious schools under the guidelines of the

¹² The brief of Senator Brydges argues that "[i]t is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its [sic] debates" (p. 37). We think that the Supreme Court, in its emphasis on "excessive entanglement" did not intend to limit legislative debate, but rather to strike down legislation which would encourage future divisive debate on religious lines. Whether this constitutional test should be modified is not within the province of this District Court. The argument can be made only to the Supreme Court.

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Supreme Court, our points of departure with the argument of the State of New York are that: (1) "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach* or practice religion." *Everson, supra*, 330 U.S. at 16 (emphasis added). We think *Tilton* does not overrule the application of the dictum to the case at bar. (2) The statute involved, though concentrating on schools in deprived areas, makes no distinction between secular and religious teaching, and tax-raised funds are directly used for the maintenance of buildings which teach religion. (3) We cannot accept the view that, under present doctrine, budgets for churches, synagogues or parochial schools can be made divisible by ascribing a percentage of cost to neutral functions. (4) On the contrary, we interpret the dictum of the Supreme Court that neutral services may be afforded to parochial schools to mean simply that general services, such as transportation, secular books, free lunches and, perhaps, athletic training, visiting nurses and the like, afforded to students in *all* schools may also be made available to students in parochial schools. (5) We think that, unlike the one-time construction of new buildings as in *Tilton*, the "maintenance and repair" provisions of the New York statute involve "continuing financial" and political "relationships [and] dependencies." *Tilton, supra*, 403 U.S. at 688.¹¹

In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within

¹¹ It must be noted that the colleges involved in *Tilton* were not directly controlled by the church; the elementary and secondary schools covered by the New York statute are controlled by a religious hierarchy.

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the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both.

II.

Section 2 of the statute provides for partial reimbursement to needy parents for the tuition they pay to send their children to parochial schools. Although the payment is to the parent, by hypothesis he is within a low annual income bracket (below \$5,000) which would make it possible that he could not afford to send his children to parochial school in the absence of a direct subsidy from the State Treasury. Indeed, it is the very assumption of the Legislature in its findings that he will use the money grant for tuition. Whether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance. The recipient is the parochial school. The source is the State tax-derived money. The parent is simply a conduit. See *Griffin v. County School Board*, 377 U.S. 218 (1964); *Griffin v. State Board of Education*, 239 F. Supp. 560, 563 (E.D. Va. 1965), *overruled on other grounds*, 296 F. Supp. 1178 (E.D. Va. 1969); *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio 1972).

While in the general distribution of a State aid program, as in the case of reimbursement of bus transportation to parents (*Everson, supra*), the loan of text books to students (*Allen, supra*), free lunches to children and the like, there is a distinction between a grant to the family and a grant to the parochial school, there is no such distinction

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where the parent is a mere conduit for a payment of tuition. In the former, the costs assumed by the State were generally borne by the parents, in the first instance, and it is they who are being reimbursed, not the school. In the case of tuition, it is the school which benefits by getting tuitions from State funds which it might otherwise not receive.¹⁴

The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their "right" to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

¹⁴ Senator Brydges' brief argues as "history" (p. 16) that with respect to Section 3209 of the N.Y. Education Law, the New York Attorney General in 1935 ruled that it applied to children attending parochial schools as well as public schools. We agree that the affirmative duty of "public welfare officials" to furnish "indigent children with suitable clothing, shoes, books, food and other necessities to enable them to attend upon instruction as hereinbefore required by law" does not require the denial of these benefits to needy children who attend parochial schools. But there is nothing in that statute concerning the payment by the state of tuition for needy children. The Education Law involved a general grant to all which did not include tuition.

As to tuition, there may be situations where special circumstances make attendance at public schools impractical as in the case of orphan schools, see *Sargent v. Board of Education*, 177 N.Y. 317 (1904); Indian schools, Education Law, art. 83; and schools for deaf and blind children, *id.* art. 85. But those sections are not relevant to normal children who can attend the public schools.

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These are serious arguments that cannot be disregarded, particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society.

The propagation of religious doctrine was early made the responsibility of the particular denomination in hard times as well as good times. We know, however, that inflation was no concern of the framers of the First Amendment, and, as individuals, we sympathize with its victims. But a State-supported church school is simply not a part of our way of life, and the payment of tuition for its pupils makes the church school a State-supported school.¹³

¹³ In the language of Chief Judge Lord in *Lemon v. Sloan*, 340 F.Supp. 1356, 1364 (E.D. Pa. 1972): "The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid those schools."

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While there can be no proof either way, it is possible that among persons eligible for the tuition grant there will be not only those who now have their children in a parochial school but also some whose children now attend the public schools and whom they would transfer to a parochial school.

The implications of recognizing a "right" to the support of public funds for the expression of the free exercise of religion are, moreover, staggering. Religious belief and the right to practice religion, including the teaching of the young, are precious rights to be preserved unto death itself. But a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment. If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca. These are all "rights" to the free exercise of religion that cannot be denied, and from the exercise of which the poor may be excluded by circumstance.

If the Founding Fathers had any intentions about religion, it was surely to separate the concern of the Government from the concern of the individual religious community. That is why we have the double-edged religion clauses of the First Amendment—no law respecting the establishment of religion or the free exercise thereof. Each sector must not only respect its own proper functions. Each must also support them. This appears to be the essence of the voluntarism requirement of the First Amend-

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ment; see Harlan, J., concurring in *Walz, supra*, 397 U.S. at 696.

The examples cited by the State to support its argument for tuition reimbursement to poor parents deal with the striking down of exactions by the State of money from the poor as a condition to their exercise of particular constitutional rights, like the right to sue in the courts for divorce without paying court costs, *Boddie v. Connecticut*, 401 U.S. 371 (1971), and the right to vote without paying a poll tax, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). So, too, *Sherbert v. Verner*, 374 U.S. 398 (1963) held invalid the denial of unemployment benefits where the free exercise of religion was inhibited. The statute here, on the contrary, affirmatively establishes benefits for the free exercise of religion. No case has been cited where an affirmative cash subsidy to advance the constitutional right to the free exercise of religion was allowed.

Nor do we ignore the argument forcefully put by the State and by representatives of the able majority leader of the State Senate. The possible closing of Catholic parochial schools on a large scale would cast a heavy burden on an already overburdened State. But we must recognize, within the guidelines set by the Supreme Court, that economic hardship alone is not enough to overcome the strictures of the First Amendment. The Court in *Lemon, supra*, accepted the legislative findings of economic stringency in the parochial schools, with the obvious, if not fully articulated, potential effect on the State finances of Rhode Island and Pennsylvania. It, nevertheless, struck down what were clearly economic measures to help the fiscal condition of

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the nonpublic schools with the possible consequence of forced absorption of their burdens by the States.

The argument, like many good arguments, stretches the band to the breaking point. For it must be tested for validity against contingencies which could occur and which would have a strong effect on legislative action, not only because of religious pressures on the legislators, but because of the conviction that the public treasury has more to gain by supporting church schools directly than by not supporting them.

If conditions worsen, it would be proper, under this argument, to pay the salaries of the secular teachers. But that is what has just been invalidated by the Supreme Court. The argument would logically admit of circumstances, honestly based upon economic need, which would support the grant of public funds, at least for secular education, in geographic areas where there were not enough parochial schools, and where the pressure of population would otherwise cause great hardship to the neighborhood public schools. Once we embark upon such a course, we fear that the meaning of the Establishment Clause will be diluted to the point where the State will support the parochial schools with the inevitable control by the State built into an anomalous situation. That is a condition devoutly not to be wished. The proponents of this legislation will probably affirm that they are willing to take their chances on such an eventuality and that they would rather have the funds in hand. But it is the peculiar function of the judicial branch to remain unmoved by current desires, not in the sense of usurping the province of legislatures, but

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in viewing basic constitutional provisions as outliving the generation of men which has to interpret them.¹⁶

III.

The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools in the State. Second, it does not involve a subsidy or grant of money from the State Treasury as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because

¹⁶ (a) A similar conclusion was recently reached by a three-judge court in the Eastern District of Ohio. *Wolman v. Essex*, 342 F.Supp. 399 (E.D. Ohio 1972). There moneys had been appropriated for "educational grants to parents" and for the provision of neutral, non-religious "materials and services" for pupils attending nonpublic schools. The statute was held to be in violation of the Establishment Clause of the First Amendment.

(b) A Pennsylvania Act providing for reimbursement of tuition payments to parents whose children attend nonpublic schools was declared unconstitutional in spite of a legislative declaration that parents who send their children to nonpublic schools assist the State in reducing the rising cost of public education, and that if children now attending nonpublic schools were forced to transfer to public schools "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state." *Lemon v. Sloan*, *supra* at 1366 (three-judge court). Chief Judge Lord wrote: "If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so." *Id.* at 1365.

Opinion of the District Court

of religious belief or otherwise, send their children to non-public full-time schools, as is their constitutional right. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the on-going political activity as likely, in our opinion, to cause division on strictly religious lines.

We shall explain our reasons briefly.

There has always been a sharp distinction in the history of the United States between direct grants of public funds to religious institutions, generally prohibited, and tax exemption for religious institutions, generally permitted. This indirect aid to religious institutions has largely taken two forms, exemption from local property taxes and the like, and income tax exemptions for contributions to religious institutions. The former method was lately before the Supreme Court in *Walz, supra*. The latter method has never been challenged in the Supreme Court. As the Court noted in *Walz*, the real property tax exemption provision for churches is two hundred years old. The acquiescence in the practice by the people, the historical absence of religious divisiveness, and the exemption's ancient origin were considered to lend support to its exclusion from the restraints the religion clauses of the First Amendment.

In *Walz*, the Court recognized that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . ." 397 U.S. at 674; yet the New York statute granting to churches as well as other educa-

Opinion of the District Court

tional and civic institutions exemption from real property taxes was sustained. The Court also noted in *Walz* that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

It certainly can be argued that if the power to tax is the power to destroy, the power not to tax is the power to support. The Supreme Court has not accepted that view, and has rejected the argument that exemptions do not differ from subsidies as a matter of economics.

Our distinguished colleague, Judge Hays, in his dissenting opinion assumes constitutional invalidity because the "purpose and effect of the statute [Part III] are . . . to subsidize religious training for children." Why, then, it may be asked, does not an income tax deduction for a contribution to a church "subsidize" religious worship for parents? If, indeed, "there is no essential difference between a parent's receiving a \$50 reimbursement for tuition paid to a parochial school and his receiving a \$50 benefit because he sends his child to a parochial school," then there should be no essential difference between a parent's receiving a \$50 "reimbursement" for a payment to his parish church and his receiving a \$50 "benefit" for the same payment. As Judge Hays states it, "in both instances the money involved represents a charge made upon the state for the purpose of religious education." With great respect, we paraphrase this to say that, in our illustration as well, it could be said that the money involved represents a charge made upon the State for the purpose of denominational worship. Yet we

Opinion of the District Court

have abided this very condition in our taxing system for many years, although we know that some denominations conduct church-related Sunday Schools or even weekday afternoon classes in religion.

Whether the distinction is based on logic, history or simply on an authoritative guideline set by the Supreme Court, we may approach our difficult task with the distinction between subsidy and tax exemption in mind. It cannot be a perfect guide, for the statute involved in *Walz* gave real property tax exemption to a great many institutions, not only churches, there was no question of arbitrary classification, and alleged State involvement with religion was at least equivocal. On the other hand, in favor of its validity is the circumstance that under Section 3 of our statute, the income tax exemption (which is in effect a tax *credit* since the exemption is not intended to equal the parents' outlay) is to *individuals*, not to churches or church schools, a step removed. This kind of income tax relief, while not as old as property tax exemption because the constitutional income tax law itself is relatively modern, has been on the Federal statute books for more than half a century. It has been a consistent legislative policy ever since the 1917 Revenue Act for the Congress to permit the deduction of so-called charitable contributions from personal income.¹⁷ This has always included direct gifts to churches. The purpose is no doubt to encourage such contributions. 5 J. Mertens,

¹⁷ Revenue Act of 1917, c. 63, §1201(2), 40 Stat. 331. That statute allowed as a deduction, "[c]ontributions . . . made to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes."

Opinion of the District Court

Law of Federal Income Taxation §31.01 (1969); *Bliss v. Commissioner*, 68 F. 2d 890 (2 Cir. 1934), *aff'd*, 293 U.S. 144 (1934).

We think that, aside from the "equal protection" problem which we do not pass upon, the credit against gross income of a fixed amount if tuition is paid to nonpublic schools, does not sponsor, or render forbidden financial support to church schools, at least in the limited form in which relief is given here. Credit is allowed not only to parents who pay tuition to a religious school but also to any nonprofit, nonpublic secular school. The table in the statute is geared roughly to the tax brackets and the rate of tax imposed on each bracket. The result ranges from a small, almost token, forgiveness to a family which attains an adjusted gross income of almost \$25,000 to a forgiveness roughly approximating the tuition cost of \$50 per child for a family in the lowest bracket. A memorandum prepared by Senator Brydges indicates that a family with three children in a nonpublic school would get a net benefit annually ranging from \$150 if the family has an adjusted gross income of less than \$9,000, to \$36 if the family has an adjusted gross income of \$24,999. The benefit is inverse to income. And we believe the Legislature has power to decide between allowing deductions and allowing credits.¹⁸

It seems to us unlikely, at least in the absence of strong proof, that a person having \$6,000 to \$9,000 per annum as an adjusted gross income would take his forgiveness or windfall, and hand it back to the parochial school as addi-

¹⁸ A deduction of \$150 for a person in a 6% tax bracket (\$7,000 to \$9,000) would have given him only a nine dollar benefit.

Opinion of the District Court

tional tuition. He would, more likely, compensate himself for the tuition paid in an amount which would otherwise have gone to the State for income taxes. Thus, it is likely that while the State loses revenue, as it does generally in allowing charitable deductions, it does not aid the parochial school, as it may, indeed, do when it allows deductions for direct contributions to the church. If, in fact, persons in a somewhat higher bracket should forego the forgiveness and turn over the tax saving to the church, that would be a voluntary act, not different in kind from an ordinary church contribution. Indeed, it is to be hoped that at least part of the costs of educating poor children will come from this source.

Once we have hurdled the constitutional barrier to income tax benefit for contributions directly made to churches, as we believe we must, there is not much further to travel. It is true that the argument may be advanced as the dissenting opinion does that the parent receives a consideration in the education of his child, while there is no *quid pro quo* in a contribution to a church. And we understand that the Federal tax authorities do scrutinize contributions of parochial school parents with that yardstick. See *Fausner v. Commissioner*, 55 T.C. 620 (1971).

We are not dealing, however, with the interpretation of a revenue act but with an inquiry upon the limitations of the power of a State Legislature under the Federal Constitution. As a Court, we may not pass on questions of religious values or even adumbrate the moral or religious "consideration" that may accrue to the donor of a gift to the church of his choice.

Opinion of the District Court

We put it more simply in practical terms. If a parishioner made a contribution to his parish, and the parish school were entirely free of tuition, would he be denied his income tax deduction because his child attended that school? Opinions may differ on the interpretation of present statutes, but it seems to us likely that an affirmative formulation by the Legislature would be constitutional.

We have not been asked to pass upon the constitutionality of part three on "equal protection" grounds, and we do not do so, cf. *Everson, supra*, 330 U.S. at 4-5." Putting such argument to one side, we think that the pressure on legislators to amend the income tax law is likely to be more from nonpublic school parents as a group rather than from parents of a single religious denomination. The principles of equity rather than of religious aid will probably be put to the fore if further liberalization by the Legislature is sought. And that we believe would not make for an inevitable excessive entanglement with religion in the legislative halls. As to administrative entanglement under part three of the statute, we see none beyond checking with the school simply to determine whether the tuition claimed to have been paid was actually paid.

We note, moreover, that the secular purpose as well as its effect is strong. The lightening of the tax burden of those who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary

²⁰ There the Court refused to consider whether the apparent exclusion of "private schools run for profit" violates the Equal Protection Clause of the Fourteenth Amendment, because the statute was not challenged on that ground.

Opinion of the District Court

choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute. 1 J. Mertens, *supra*, §4.09. As we have said, however, we do not now deal with the "equal protection" argument, the reasonableness of the classification by those standards, or whether there is an appropriate governmental interest suitably furthered by the different treatment. See *Police Department v. Mosley*, — U.S. —, 92 S. Ct. 2286 (1972).

We hold only that Section 3 of the statute is not in conflict with the First Amendment Establishment Clause, as applied to the states through the Fourteenth Amendment.

We also find Section 3 of the statute separable from the parts found to be unconstitutional. The statute itself contains a separability clause (§11). And we are not required to invalidate the entire Act. See *Tilton, supra*, 403 U.S. at 683-84; *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932).

A permanent injunction will be issued against the enforcement of Sections 1 and 2 of the statute. Judgment will be entered accordingly, pursuant to Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay. A permanent injunction against enforcement of Section 3 of the statute will be denied. The complaint so far as it relates to Section 3 of the statute, will not be dismissed, however. The parties may move for summary judgment or for an expedited trial.

An order will be settled on notice.

Opinion of the District Court

The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Dated: October 2, 1972.

PAUL R. HAYS, *U. S. C. J.*
(Dissenting in part)

JOHN M. CANNELLA, *U. S. D. J.*
MURRAY I. GURFEIN, *U. S. D. J.*

Opinion of the District Court

HAYS, *Circuit Judge*, in part concurring in the result; dissenting in part:

I am in agreement with the view of my colleagues that the part of the state statute (N.Y. Laws of 1972, c.414) providing for grants to private schools for the maintenance of buildings cannot survive a challenge based on the Establishment Clause and the cases decided under it. *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Bd. of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Education*, 330 U.S. 1 (1947). I agree with Judge Gurfein's view that the part of the statute providing for flat tuition grants to low-income parents is also unconstitutional. In addition to the cases previously cited see also *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio, 1972) (three judge court); *Lemon v. Sloan*, 340 F. Supp. 1356 (E.D. Pa., 1972) (three judge court). I therefore concur in the result reached by Judge Gurfein as to these aspects of the statute.

I dissent from the court's judgment concerning section 3 of the state act. I believe that that section, which provides for tax benefits with respect to tuition paid by the taxpayer for children attending religious schools, is also unconstitutional.

The purpose and effect of this provision of the statute are the same as the second portion, i.e., to subsidize religious training for children.¹ Both sections aim to reimburse

¹ Although section 3 is made applicable to parents whose children attend any nonprofit nonpublic school, the overwhelming majority of these parents are sending their children to religious schools where sectarian indoctrination takes place. According to the

Opinion of the District Court

parents who have chosen to send their children to religious schools. As Mr. Justice Jackson said:

"The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination." *Everson v. Bd. of Education*, 330 U.S. at 24 (Jackson, J. dissenting).

And "[w]hat may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." *Abington School District v. Schempp*, 374 U.S. 203, 230 (Douglas, J. concurring).²

The benefits of the tax exemption allowed by section 3 are of the same nature as those accorded under the tuition reimbursement provisions of section 2. There is no essen-

Fleischman Commission report, religious schools make up 93.5% of New York State's *nonpublic* schools. The remaining 6.5% consist of both profit-making and nonprofit-making private schools. Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary Education, "The Collapse of Nonpublic Education: Rumor or Reality?," Vol. 1, pp. 1-6. See Transcript in *Pearl v. Nyquist*, p. 64. The profit-making schools are not, of course, covered by section 3.

² In the context of racial discrimination, grants to schools, students or their parents to avoid the commands of the Fourteenth Amendment have been consistently struck down. See *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La., 1961), *aff'd*, 368 U.S. 515 (1962); *Lee v. Macon County Bd.*, 267 F. Supp. 458 (M.D. Ala., 1967), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967); *Brown v. South Carolina State Bd.*, 96 F. Supp. 199 (D.S.C., 1968), *aff'd*, 393 U.S. 222 (1968); *Coffey v. State Educ. Finance Comm'n*, 296 F. Supp. 1389 (S.D. Miss., 1969).

Opinion of the District Court

tial difference between a parent's receiving a \$50 reimbursement for tuition paid to a parochial school and his receiving a \$50 benefit because he sends his child to a parochial school. In both instances the money involved represents a charge made upon the state for the purpose of religious education.

The exemption of church property from ordinary taxation provides no analogy for the tax benefits of the present statute. The schools in the nonprofit nonpublic category in New York State are tax-exempt, N.Y. Real Prop. Tax Law §421 (1) (a) (McKinney Supp. 1971), and that status is not in dispute in this case. In *Walz v. Tax Commission*, supra, the Court believed nearly two centuries of acquiescence in and approval of such exemptions lent support to the proposition that the exemptions did not violate the Establishment Clause. 397 U.S. at 680. Moreover, the Court noted in *Walz* that the State had not "singled out one particular church or religious group or even churches as such; rather it [had] granted exemption to all houses of worship within a broad class of property owned by non-profit, quasi-public corporations" *Id.* at 673. Here, as the three judge panel pointed out in *Wolman v. Essex*, supra, "[t]he limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute." 342 F. Supp. at 412. Finally, the *Walz* court held (p. 674) that:

"Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

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The *Wals* decision, as the Court said in *Lemon v. Kurtzman*, *supra*, p. 614, "tended to confine rather than enlarge the area of permissible state involvement with religious institutions"

Nor does the present case concern the tax deductibility of religious contributions. Such contributions, even to church schools, are deductible under New York law, N.Y. Tax Law §360(10b) (McKinney 1966), and they would not be affected by the statute under scrutiny. Even assuming that tax deductions for contributions to religious schools are constitutional—a point not yet passed upon by the Supreme Court—we are not dealing with such deductions in the present case. A payment for services rendered is not a contribution, and such payments are not deductible. As the court said in *DeJong v. Commissioner*, 36 T.C. 896, 899-900 (1961), *aff'd* 309 F.2d 373 (9th Cir. 1962):

"We are satisfied on the record before us that at least a portion of the \$1,075 paid by petitioners to the society was in the nature of tuition fees for the education which the society was expected to furnish to petitioners' children and was not in fact a true charitable contribution. Payments pledged and made by parents in the circumstances disclosed by the evidence were not voluntary and gratuitous contributions motivated merely by the satisfaction which flows from the performance of a generous act; they were induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the society's school."

Opinion of the District Court

See also *McLaughlin v. Commissioner*, 51 T.C. 233 (1968); *Fausner v. Commissioner*, 55 T.C. 620 (1971).

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.³

As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature would not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). It is obvious that the New York state legislature would not have

³ The following table shows the estimated net benefits to taxpayers under section 3. The information is taken from the memorandum which accompanied the bill. It was submitted to each legislator by Senator Brydges and was cited by the majority of the p.

If Adjusted Gross Income is	Income Exclusion Per Pupil is	Estimated Net Benefit to Family		
		One child	Two children	Three or more
less than \$ 9,000	\$1,000	\$50.00	\$100.00	\$150.00
\$ 9,000 - 10,999	850	42.50	85.00	127.50
11,000 - 12,999	700	42.00	84.00	126.00
13,000 - 14,999	550	38.50	77.00	115.50
15,000 - 16,999	400	32.00	64.00	96.00
17,000 - 18,999	250	22.50	45.00	67.50
19,000 - 20,999	150	15.00	30.00	45.00
21,000 - 22,999	125	13.75	27.50	41.25
23,000 - 24,999	100	12.00	24.00	36.00
25,000 and over	0	0	0	0

Opinion of the District Court

enacted section 3 benefiting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

For the foregoing reasons I respectfully dissent from the determination of the court as to the constitutionality of section 3.

APPENDIX B

Order and Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Order and Judgment

Plaintiffs' motion for the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2281, 2284 having come on to be heard on June 20, 1972 before the Hon. Murray I. Gurfein, United States District Judge, and the parties having conceded at that time that this action required the convening of a three-judge District Court, and Judge Gurfein having set the matter down for a hearing during the week of July 3, 1972 upon a representation that there were no factual issues involved; and the case having thereafter come on to be heard on the merits on July 6, 1972 before Judge Gurfein, the Hon. Paul R. Hays, United States Circuit Judge, and the Hon. John M. Cannella, United States District Judge, and all parties having submitted briefs and presented oral argument; and the Court, after due deliberation, having concluded on July 21, 1972 that Section 1 of Chapter 414 of the 1972 Laws of New York is in violation of the Establishment Clause of the First Amendment to the United States Constitution, and the Court having set forth the reasons for this decision in an opinion dated October 2, 1972; and the Court having further concluded in its opinion of October 2, 1972 that Section 2 of Chapter 414 is unconstitutional and that Sections 3, 4 and 5 of Chapter 414 are not in violation of the Establishment Clause of the First Amendment, Judge Hays dissenting with respect to Sections 3, 4 and 5 of Chapter 414; and the Court having directed that judgment be entered, permanently enjoining enforcement of Sections 1 and 2 of Chapter 414; and the Court having further stated that the parties may move for summary judgment or for an expedited trial with respect to Section[s] 3 [and 4 and 5] of Chapter 414; and defendants and intervenor-defendants having duly moved for summary

Order and Judgment

judgment dismissing the complaint with respect to Sections 3, 4 and 5 of Chapter 414;

Now, upon all of the proceedings heretofore had herein, it is hereby

ORDERED, ADJUDGED AND DECREED that Section 1 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair; and it is further

ORDERED, ADJUDGED AND DECREED that Section 2 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of

Order and Judgment

any tuition payments heretofore or hereafter made to non-public elementary and secondary schools; and it is further

ORDERED, ADJUDGED AND DECREED that Sections 3, 4 and 5 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York be, and it hereby is, granted; and it is further

ORDERED that the complaint, insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York, be, and it hereby is, dismissed.

Dated: New York, New York

October 20, 1972

PAUL R. HAYS, *U.S.C.J.*

JOHN M. CANNELLA, *U.S.D.J.*

MURRAY I. GURFEIN, *U.S.D.J.*

ENTERED:

10/20/72 JOHN LIVINGSTON

Clerk

APPENDIX C

**Notice of Appeal to the Supreme Court
of the United States**

(Filed—November 17, 1972)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

against

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as
Commissioner of Taxation and Finance of the State of
New York,

Defendants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M.
DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA,
ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

and

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,
Intervenor-Defendant.

*Notice of Appeal***SIRS:**

Notice is hereby given that Intervenor-Defendant Senator Earl W. Brydges hereby appeals to the Supreme Court of the United States from so much of the Order and Judgment entered in this action on October 20, 1972 as declares that sections 1 and 2 of chapter 414 of the New York Laws of 1972 violate the Establishment Clause of the First Amendment to the Constitution of the United States and permanently enjoins "the defendants and their agents and all persons acting for or on behalf of the State of New York * * * from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair" and also permanently enjoins "the defendants and their agents and all persons acting for or on behalf of the State of New York * * * from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or in reimbursement of any tuition payments heretofore or hereafter made to non-public elementary and secondary schools."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Notice of Appeal

Dated: Albany, New York
November 15, 1972

Yours, etc.

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POOR COPY

APPENDIX D

Session Laws of New York

Education—Nonpublic Schools—Aid

CHAPTER 414

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, effective as provided in section 12.

Passed on message of necessity. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law § 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12—HEALTH AND SAFETY GRANTS FOR NONPUBLIC SCHOOL CHILDREN

Section

549. Legislative findings.

550. Definitions.

551. Apportionment.

552. Applications, reports, regulations.

553. Installments.

§ 549. Legislative findings

The legislature hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

2. The state discharges this responsibility to public school children through substantial amounts of per pupil financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

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3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five,¹ which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but none the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

¹ 20 U.S.C.A. § 1061 et seq.

§ 550. Definitions

In this article:

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d),¹ (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,² as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).

3. "Base year" shall mean the school year immediately preceding the current year.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.

5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session

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§ 551. Apportionment

1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 552. Applications, reports, regulations

Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. Installments

The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July

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payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A, to read as follows:

ARTICLE 12-A—ELEMENTARY AND SECONDARY EDUCATION OPPORTUNITY PROGRAM

Section

559. Legislative findings.

560. Short title.

561. Definitions.

562. Tuition reimbursement payments to parents.

563. Commissioner; powers.

§ 559. Legislative findings

The legislature hereby finds and declares that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

3. Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.

4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.

5. An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition reimbursement for par-

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the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.

§ 560. Short title

This article shall be known as the "Elementary and Secondary Education Opportunity Program".

§ 561. Definitions

The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000(d),¹ and (iii) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,² as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar year exclusive of July and August.

¹ 42 U.S.C.A. § 2000(d).

² 26 U.S.C.A. (I.R.C. 1954) § 501(c)(3).

§ 562. Tuition reimbursement payments to parents

1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.

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IN THE

MICHAEL RODAK, JR.,

Supreme Court of the United States

October Term, 1972

No.72-791

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

and

Appellants,

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR., and ADAMINA RUIZ,

and

Intervenor-Appellants,

EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

against

Intervenor-Appellant,

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWAN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANTS NYQUIST, LEVITT AND GALLMAN

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IN THE
Supreme Court of the United States

October Term, 1972

No.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Appellants.

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR., and ADAMINA RUIZ,

Intervenor-Appellants.

and

EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

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against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWAN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Appellees.

**STATEMENT AS TO JURISDICTION ON BEHALF OF
APPELLANTS NYQUIST, LEVITT AND GALLMAN**

Pursuant to Rules 13 (2) and 15 of the Rules of the Supreme Court of the United States, the appellants Ewald B. Nyquist, Arthur Levitt and Norman Gallman file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

Opinions Below

The opinion of the majority of the Judges in this case, sitting as a statutory Court of three Judges, written by the HON. MURRAY I. GURFEIN, Judge of the United States District Court for the Southern District of New York, and concurred in by the HON. JOHN M. CANNELLA, Judge of the United States District Court for the Southern District of New York, sustained the complaint in part, holding sections 1 and 2 of chapter 414 of the New York Laws of 1972 to be unconstitutional, as being in violation of the Establishment Clause of the First Amendment to the Constitution of the United States, and enjoined the further implementation by defendants Nyquist and Levitt of those sections of the statute which provide for payment of State funds to nonpublic schools for repairs and maintenance and for payment of State funds to partially reimburse tuition paid by low-income parents of nonpublic school pupils. The majority of the Court held that sections 3, 4, and 5 of chapter 414, which provide for an adjustment of gross income for State income tax purposes for parents paying tuition to nonpublic schools does not violate the Establishment Clause of the First Amendment to the Constitution of the United States. The HON. PAUL R. HAYS, Associate Judge of the United States Court of Appeals for the Second Circuit, dissented in a separate opinion from so much of the decision as held that sections 3, 4 and 5 of chapter 414 of the New York Laws of 1972 are not unconstitutional. The majority opinion, the dissenting opinion and the final judgment appealed from are set out in the Appendix hereto and marked as Appendix "A", "B", and "C" respectively. There are as yet no citations to these opinion.

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened therein under 28 United States Code, §§ 2281 and 2284. The judgment holds sections 1 and 2 of chapter 414 of the New York Laws of 1972 to be unconstitutional on the ground that they violate the Establishment Clause of the First Amendment to the Constitution of the United States and enjoins the defendants from making any payments from State funds for reimbursement of moneys expended by nonpublic schools for maintenance and repair or for reimbursement of any tuition payments made to nonpublic schools by low-income parents of children enrolled in such schools. The judgment held sections 3, 4, and 5 of chapter 414 of the New York Laws of 1972 to be constitutional and not in violation of the Establishment Clause of the First Amendment to the Constitution of the United States; those sections provide for adjustments of gross taxable income, for New York State income tax purposes, to parents of children enrolled in nonpublic schools in the State.

The complaint sought declaratory and injunctive relief against implementation of sections 1, 2, 3, 4, and 5 chapter 414 of the New York Laws of 1972, alleging that those provisions of the statute violated the Establishment Clause by providing payments to nonpublic schools in the State as reimbursement for expenses of repair and maintenance, by partially reimbursing parents of low income for tuition paid on behalf of their children to nonpublic schools, and by providing for adjustments of gross taxable income for New York State tax purposes to parents paying tuition to nonpublic schools on behalf of their children.

The final judgment, granting the relief sought in the complaint as to sections 1 and 2 of chapter 414 and denying relief as to sections 3, 4, and 5 of that chapter, was made and entered October 20, 1972. Notice of Appeal on behalf of defendants Nyquist, Levitt, and Gallman was filed on November 8, 1972 in the United States District Court for the Southern District of New York (a copy of which is made Appendix "D" hereto). Notices of appeal were also filed on behalf of intervenor-defendant parents of children enrolled in nonpublic schools and by intervenor-defendant Brydges from that part of the judgment which holds section 2 of chapter 414 to be unconstitutional and by the plaintiffs from that part of the judgment which holds sections 3, 4, and 5 to be constitutional.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United States Code, § 1253.

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Flast v. Cohen*, 392 U. S. 83 (1968); *Board of Education v. Allen*, 392 U. S. 236 (1968); *Lemon v. Kurtzman*, 403 U. S. 602 (1971); and *Tilton v. Richardson*, 403 U. S. 672 (1971); *Levitt v. Committee for Public Education and Religious Liberty*, probable jurisdiction noted November 6, 1972.

Statute Involved

Chapter 414 of the New York Laws of 1972 is summarized herein as pertinent to this appeal (the full text is set out as Appendix "E" to this statement).

Section 1 of chapter 414 adds a new Article 12 to the New York Education Law (McKinney's Consolidated Laws of New York), providing for health and safety grants to

nonpublic schools. The grants would be payable only to nonpublic schools which have been certified under Title IV of the Federal Higher Education Act of 1965 as serving a high concentration of pupils from low-income families. The grants, in the amount of \$30 per pupil plus an additional \$10 per pupil attending school in a building constructed prior to 1947, would be payable for maintenance and repair of the nonpublic schools. The New York Legislature specifically found, in enacting this legislation, that these grants are necessary to protect the health, safety and welfare of children attending nonpublic schools, particularly in those where the financial resources of the parents are not sufficient to adequately maintain the structures.

Section 2 of chapter 414 adds a new Article 12-A to the New York Education Law, providing an equal educational opportunity program. This Article provides for the reimbursement of parents, with a gross annual of income of less than \$5,000, for not more than 50% of the cost of tuition paid to a nonpublic school on behalf of their children. In so doing, the Legislature specifically found that the constitutionally guaranteed right of parents to select a nonpublic school education for their children is diminished or effectively denied to parents of low income who are unable to afford the tuition necessary to select such an education. In accordance with the State's established policy of providing for the economic and constitutional necessities of parents of low income, the New York Legislature enacted this article which provides for the reimbursement of a portion of the tuition paid by such parents.

The third portion of the statute which was challenged in the action but is not relevant to the appeal by these appellants, added a new subsection j to section 612 of the New York Tax Law, affording a modification of "gross taxable

income" to parents who pay nonpublic school tuition. The parents' gross taxable income would be reduced by a fixed amount per child attending a nonpublic school, based on a sliding scale under which parents with the lowest incomes receive the highest amount of modification of income. Parents who claim tuition reimbursement pursuant to Article 12-A of the Education Law would not also be entitled to claim the modification of gross income here provided.

Questions Presented

1. Do grants to nonpublic schools for maintenance, repair and physical operation of those schools, in the exercise of the State's police power and for the purpose of protecting the health and safety of the children attending those schools, constitute an establishment of religion in violation of the First Amendment to the Constitution of the United States?

2. Are the health and safety grants, so provided, a neutral form of aid similar to those forms of aid to nonpublic schools which have previously been approved by this Court?

3. Does the partial reimbursement of tuition paid by low-income parents to nonpublic schools on behalf of their children constitute a valid State expenditure for the purpose of guaranteeing to persons of low-income the exercise of their constitutionally protected right to select a nonpublic school education for their children or for the purpose of fulfilling the State's obligation to provide for the necessities of life and for access to constitutional rights to persons of low income?

Statement of the Case

Plaintiffs commenced this action seeking to have sections 1, 2, 3, 4, and 5 of chapter 414 of the New York Laws of 1972 declared unconstitutional, alleging that those provisions violate the Establishment Clause of the First Amendment to the Constitution of the United States. The complaint also sought an injunction restraining payments of State funds in implementation of sections 1 and 2 of the act and restraining the implementation of sections 3, 4, and 5 of the act.

A motion to intervene in the action was made by several parents of children enrolled in nonpublic schools and who would be beneficiaries of the challenged provisions of the act. The motion was granted.

A motion to intervene was also made by Earl W. Brydges, the Majority Leader and President Pro Tem of the New York State Senate. That motion was also granted.

The District Court, in its decision, specifically held that it accepted the findings of the Legislature as to the purposes of the enactments, and that those findings sum up legislative purposes which are secular in intent. Thus, as relevant to this appeal, the Court expressly started with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas, and with the assumption that the Legislature intended to provide a quality education for all children and to preserve a pluralistic society by providing money to poor parents for tuition in nonpublic schools. Relying primarily upon the recent decisions of this Court in *Lemon v. Kurtzman*, *supra*; *Tilton v. Richardson*, *supra*; and *Walz v. State Tax Commission* (397 U. S. 664 [1970]),

the Court held that public moneys may not be used for the repair or maintenance of nonpublic school buildings in which the religious and secular functions are combined. In response to the argument that repair and maintenance are neutral in character, not sectarian, the Court rejected the contention that nonpublic school budgets are divisible and held that subsidies of public moneys, even for secular purposes, lighten sectarian school budgets and make possible the diversions, to religious purposes, of funds which the schools would otherwise have had to expend for the upkeep of the physical plants of the schools. This latter result, the Court found, rendered the statute in violation of the First Amendment to the Constitution of the United States. The Court also found that any money payment to the schools was a relationship "pregnant with involvement" and invited excessive entanglement between government and religion. While the Court accepted the argument that the statute was an exercise of the police power of the State, it held that that could not validate the statute where it was found to violate a provision of the Federal Constitution.

As to section 2 of the State statute, the Court found that the parents receiving the money were only conduits for the payment of the money to the nonpublic schools in the form of tuition. Recognizing the poor should have equal rights with the rich to practice their religions and that the conditions of rich and poor should be equalized before the law, the Court nevertheless held that the support of religious schools should be the responsibility of the particular religious denomination, not the State. Nor did the Court find any support for the statute in the potential effect upon public education if nonpublic schools were to close in substantial numbers because of financial difficulties. The Court

expressed a belief that support of nonpublic schools in any degree, based on such an argument, could lead to complete support of sectarian education.

The dissenting Circuit Judge (HAYS, J.) disagreed with the majority only as to those provisions of the statute providing for a modification of gross taxable income and concurred with the majority in their findings as to sections 1 and 2 of the act.

The Questions are Substantial

Over a period of years, this Court has considered the question of what form of payments or aid may constitutionally be provided to nonpublic schools or to children enrolled in them. The Court has held that school bus transportation may be provided to children attending sectarian schools (*Everson v. Board of Education*, 330 U.S. 1 [1947]); that textbooks may be provided to children attending church-related schools (*Board of Education v. Allen*, 392 U.S. 236 [1968]); that public moneys may be spent for the construction of academic buildings at church-related colleges (*Tilton v. Richardson*, 403 U.S. 672 [1971]); and has also held that payments may not be made either to schools or to individuals for the cost of teaching or teachers' salaries (*Lemon v. Kurtzman*, 403 U.S. 602 [1971]), nor may payments be made for reimbursement of tuition paid by all parents of children attending nonpublic schools (*Essex v. Wolman*, — U.S. — [Oct. 10, 1972], affg. 342 F. Supp. 399).

None of those cases have involved the precise questions here at issue. Those questions are, first, whether the State may, in the exercise of its police power for the protection of the health, safety and welfare of children attending nonpublic schools in the State, make grants of public moneys to the nonpublic schools for the purposes of repair, main-

tenance and operation of the physical plant of the schools, as opposed to expenditures for the educational function of the schools. Secondly, this case presents the question of whether the State may, in an effort to secure to low income parents the ability to exercise their constitutional right to select a nonpublic school education for their children, reimburse those parents for a portion of the tuition paid to nonpublic schools.

This Court has never ruled upon whether the State may expend money for police power purposes to protect the structural integrity of buildings used by children; nor has the Court ever ruled on whether the State may expend money for the purpose of assuring to low income citizens the financial ability to exercise constitutional rights under the First Amendment.

A.

New Article 12 of the New York Education Law (added by section 1 of Chapter 414), which provides health, welfare and safety grants to nonpublic schools for maintenance, repair and physical operation of those schools, was enacted for the express purpose of protecting the health and safety of children attending those schools. In enacting that Article, the New York Legislature specifically made a finding in the statute that the State has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools. It recognized that that objective is met in the case of public school children through grants of State aid and through municipal taxing power. The Legislature further specifically found that the fiscal crisis in nonpublic education has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of children attending those schools, particularly in urban areas; that nonpublic schools

in low income areas are characterized by deteriorating physical structures; and that the parents of children enrolled in those nonpublic schools do not have the financial resources necessary to adequately maintain the structures. These specific factual findings the District Court held were to be accepted as true, particularly as indicating that the Legislature's intent in enacting the statute was secular in nature. The New York Legislature concluded from its factual findings that the State has the right and obligation to ensure that the physical environment in nonpublic schools in those low income areas is both healthful and safe. To the extent that this finding represented a conclusion of constitutional law, the District Court found that it was not bound to accept it.

In order to meet the objective of safe and healthful buildings for nonpublic school children, the Legislature has provided in this statute for grants for maintenance, repair and operation of buildings. Those grants amount to a maximum of \$30 per pupil, increased by an additional \$10 per pupil attending classes in a building constructed prior to 1947. The grants are limited to not more than 50% of the average statewide per pupil cost of maintenance and repair in public schools, and may not exceed the amount actually expended by the nonpublic school for maintenance, repair and operation in the preceding base year, as certified by a required audited statement of expenditures.

Not all nonpublic schools in New York State will qualify for grants under this act. Only those schools will qualify which have been certified as serving a high concentration of low income pupils for the purposes of Title IV of the Federal Higher Education Act of 1965 (20 U. S. C., § 425).*

* Title IV of the Federal Higher Education Act of 1965 provides that a portion of moneys borrowed by students to secure college education will be forgiven to any borrower who teaches in a school serving a high concentration of children from low income families.

Thus, only a small percentage of the total number of non-public schools will be eligible for these grants (less than 25% of the total number of nonpublic schools in the State of New York).

The District Court in this case held that, although it accepted the intention of the New York Legislature as being essentially secular and within the police power of the State, the effect of Section 1 of the statute would be to advance religion and the statute, therefore, would be unconstitutional. In so holding, the Court based its findings upon conclusions that no public moneys may ever be spent to support sectarian institutions, in whole or in part; that the statute makes no distinction between parts of school buildings in which secular or sectarian subjects are taught; that the budgets for sectarian institutions are not constitutionally separable so as to ascribe a percentage of their total neutral functions; that the only neutral services which may be afforded to pupils attending sectarian institutions are those which are equally afforded to students in both public and nonpublic schools; and that the provision of continuing allowances for maintenance and repair involve "continuing financial" and political "relationships [and] dependencies" in the language of this Court in the *Tilton* case, *supra* (403 U. S. at 688).

The issue here, therefore, is a substantial one, embracing the question of the extent of the State's police power where there may also be involved incidental aid to religious institutions.

In *Jacobson v. Massachusetts* (197 U. S. 11 [1905]), Mr. Justice HARLAN discussed the extent of the State's police power, observing (pp. 24-25):

"The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender

when becoming a member of the Union under the Constitution. Although this Court has refrained from any attempt to define the limits of that power, *yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description;'* indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. (According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." (Emphasis added.)

And in *City of El Paso v. Simmons* (379 U. S. 497 [1965]), this Court again clearly expressed the broad powers of state legislatures in police power legislation, holding (p. 508):

"The State has the 'sovereign right * * * to protect the * * * general welfare of the people * * *. Once we are in this domain of the reserve power of the State, we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary.'"

While the cases above cited dealt with statutes different in specific scope and purpose from the statute here at issue, they are all alike in one respect, that is, they deal with questions of public health and safety and the extent of the State's police power. Here too, there is a distinction that in those cases the questions were of restrictive regulation, rather than the expenditure of public funds. However, there is no essential difference in the scope of the police power between police power legislation which restricts and police power legislation which expends money to accomplish a health and safety objective.

This identity of result was recognized by this Court in *Everson* (*Everson v. Board of Education*, 330 U. S. 1 [1947]). In that case, the Court approved the expenditure

of public funds to provide school bus transportation for children attending nonpublic schools, in part at least, as an exercise of the State's police power. In considering whether the providing of bus transportation served a valid secular purpose, this Court stated (p. 7) :

"It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose * * *. The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking'."

Again, with reference to the purpose of the New Jersey legislation there at issue, this Court stated (p. 18) :

"Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

It would be an anomaly if the State could provide for the safety of children in reaching the doors of the nonpublic schools but could not guard them against hazards to their health and safety once they enter those doors.

Since the Court below accepted the Legislature's findings that section 1 of the statute here involved is a police power measure, designed to protect the health and safety of children attending nonpublic schools, and, since the State's police power is a reserved power of the states, this case presents a very substantial question as to the extent of a state's power under those reserved powers and of the balancing of those reserved powers against provisions of the Federal Constitution.

This, we submit, is an issue which has not previously been dealt with by this Court and is so substantial as to warrant consideration and resolution.

B.

In *Tilton v. Richardson*, *supra*, this Court approved the expenditure of Federal funds for the construction of academic buildings at church-related colleges. In that case, the Court observed that "The entanglement between church and state is also lessened here by the nonideological character of the aid which the government provides." In *Lemon v. Kurtzman*, *supra*, this Court also stated (403 U. S., pp. 616-617):

"Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

And again, in *Tilton*, this Court rejected any theory that all financial aid to sectarian institutions was constitutionally prohibited, stating (p. 679):

"The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Brandfield v. Roberts*, 175 U. S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all give aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld."

In the instant case, the aid involved is secular, neutral and nonideological. It provides for a portion of the cost

of repair and maintenance of school buildings in areas which serve a high concentration of low income pupils, where presumably the parents of those children are unable to bear the cost of maintenance and repair, particularly of older structures.

This Court has not previously considered the question of whether the provision of building maintenance aid in general, or limited to schools serving low income areas, is a neutral, non-ideological aid to nonpublic schools which is permitted under the Establishment Clause. This question, we submit, is substantial and warrants the consideration and resolution by this Court.

C.

New Article 12-A, added to the New York Education Law by section 2 of the statute here at issue, provides for the reimbursement by the State of a portion of the tuition paid to nonpublic schools by parents whose State net taxable income is less than \$5,000 per year. Tuition reimbursement will be paid in an amount equal to the lesser of 50% of tuition paid or \$5 per month per pupil attending elementary school and \$10 per month per pupil attending a secondary school. Thus, the maximum amount of reimbursement payable on behalf of a child is \$50 for an elementary school pupil or \$100 for a secondary school pupil.

Initially, it must be noted here that this statute differs in one significant respect from the statutes at issue in the *Wolman* and *Lemon* cases (*Wolman v. Essex*, 342 F. Supp. 399 [S. D. Ohio, April, 1972], *affd.* ____ U. S. ____ [Oct. 10, 1972]; *Lemon v. Sloan*, 340 F. Supp. 1356 [E. D. Pa., 1972]). In those cases, the statutes of Ohio and Pennsylvania, which were at issue there, provided

tuition reimbursement to *all* parents of children attending nonpublic schools, whereas the New York statute here provides for reimbursement *only* to low income parents. This distinction, and the legislative findings in support of the statute, are, we submit, decisive in support of the constitutionality of this statute and raise questions sufficiently substantial to warrant the full consideration of this Court.

In enacting Article 12-A, the Legislature of the State of New York specifically recognized that parents have a constitutional right to satisfy a State's compulsory attendance laws by selecting either a public or nonpublic school education for their children, including a sectarian education. The Legislature further found that that constitutional right is diminished or even denied to children of lower income families; and that the State has a right to make provision so that such families and their children are not excluded from the exercise of that constitutional right of selection because of their inability to pay the cost of a nonpublic school education.

Article 12-A is the State's attempt to meet that objective of assuring that its citizens are not excluded from constitutionally secured rights solely because of inability to meet the costs of those rights.

The New York Legislature's findings in relation to constitutional rights and obligations were not carved out of thin air. They have a solid foundation in the decisions of this Court.

In *Pierce v. Society of Sisters* (268 U. S. 510 [1925]), this Court held that a State may not require all children to attend public schools, and that parents have a constitutionally guaranteed right to satisfy a State's compulsory

attendance laws by selecting either a public or nonpublic education, including a sectarian education.

This Court has also held that a person's access to the exercise of a constitutional right cannot be denied or withheld because of his inability to pay for the exercise of that right (see, e.g., *Boddie v. Connecticut*, 401 U. S. 371 [1971]; *Harper v. Virginia State Board of Elections*, 383 U. S. 663 [1966]).

In *Boddie*, in which this Court held that access to the judicial process could not be denied to persons unable to pay court costs, Mr. Justice DOUGLAS in his concurring opinion stated (p. 383):

"Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."

In *Harper*, this Court invalidated a poll tax as a condition precedent to the exercise of the right to vote, holding that the elective franchise may not be withheld because of a voter's inability to pay a poll tax.

Additionally, both the State and Federal governments have recognized a responsibility toward the support of indigents, both as to the necessities of life and access to constitutional rights. The social services system itself is a recognition of that responsibility, as is the provision of free legal counsel to indigents in both civil and criminal cases, and as are free health care, the school lunch program, and similar programs and services.

New York's provision for partial tuition reimbursement is reasonably calculated to enable low income parents to secure effective access to their constitutional right to select a nonpublic school education for their children.

The Court below distinguished the cases above cited and other similar ones on the basis that in those cases what was held invalid was a State exaction preventing the exercise of constitutional rights. At the same time, however, the Court disregarded the fact that the results of those cases may require a State expenditure of money for the benefit of the persons benefited by the constitutional right being exercised. As pointed out above, free legal counsel must be provided to indigents, requiring the outlay of funds to appointed attorneys; free transcripts must be provided as a part of access to the courts, requiring the outlay of State money to stenographers providing the transcripts; and one of the cases cited by the Court below, *Sherbert v. Verner* (374 U. S. 398 [1966]), prohibited the denial of unemployment insurance benefits to a person who refused to work on Saturday because of religious beliefs, thus requiring the payment of moneys to a person to further the practice of his religious beliefs.

New York's tuition reimbursement program also, we submit, meets the test of constitutionality set by this Court for statutes which may provide incidental aid to sectarian institutions. The Court below found that Article 12-A has a secular purpose, that is, the securing of the constitutional rights of low income citizens. Its primary effect is not to aid or inhibit religion, but rather to aid those same low income citizens in securing their choice of education for their children. The fact that there may also be some indirect benefit to the nonpublic schools does not by itself, as this Court held in *Board of Education v. Allen, supra*, "demonstrate an unconstitutional degree of support for a religious institution". Finally, reimbursement to *parents* of a portion of the tuition which *they*

have paid does not result in an excessive entanglement between the State and the *schools*. There is, in fact, no contact whatsoever between the two which could result in any entanglement.

It is, therefore, submitted that this case presents substantial questions as to the extent of the State's power to provide benefits to low income persons and to protect them in the exercise of their constitutional rights.

CONCLUSION

The questions presented on this appeal are substantial and should be heard, considered and resolved by this Court.

Dated: November 13, 1972.

Respectfully submitted,

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APPENDIX "A"

Majority Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON and CHARLES H. SUMNER,

Plaintiffs,

against

EWALD B. NYQUIST, As Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Defendants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Defendant.

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GURFEIN, D. J.

We are again confronted with the question of the constitutionality of an Act of the New York Legislature relating to nonpublic schools, the children who attend them, and their parents. The plaintiffs are an unincorporated association and individuals who are residents of the State of New York and who pay income taxes and other taxes to that State. Some of the plaintiffs have children attending public schools. The defendants are the Commissioner of Education, the Comptroller and the Commissioner of Taxation and Finance of the State of New York.¹

Jurisdiction is alleged under United States Code, Title 28, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202. The amount in controversy, exclusive of interest and costs, is alleged to be in excess of \$10,000.

By consent of all parties, a motion to convene a three-judge court pursuant to Title 28, Sections 2281 and 2283, was granted and this Court was convened.

The plaintiffs seek to enjoin the defendants from approving or paying any funds or according tax benefits as provided in the Act to be described. The State seeks a dismissal of the complaint on the merits but asserts no jurisdictional bar to maintenance of the action.

Since no trial has been had, the attack upon the several parts of the Act assumes that they are each facially unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution. The Act (N. Y. Laws of 1972, c.414) is divided into five parts, three of which are attacked by the plaintiffs as being in violation of the establishment clause which guarantees the sepa-

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ration of Church and State, as applied to the states by the Fourteenth Amendment.² These three parts of the statute which are under attack may be summarized as follows:

A. Section 1 provides for grants of money directly from the State Treasury to nonpublic schools for "maintenance" of the buildings if the nonpublic school has been designated during a base year as "serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U. S. C. A. § 425)."³ If the school qualifies under the federal standards, it is to be given a direct grant of \$30 per pupil in attendance, which is increased to \$40 per pupil to those schools which are more than twenty-five years old.⁴ The grants, which are given directly to the particular nonpublic schools eligible for such grants, are to be in reimbursement of "maintenance and repair" costs incurred in the preceding year. "Maintenance and repair" is defined as "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner [the State Commissioner of Education] may deem necessary to ensure the health, welfare and safety of enrolled pupils." Each qualifying school which seeks an apportionment is required to submit to the Commissioner an application which shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

This part of the Act is entitled "Health and Safety Grants for Nonpublic School Children" and is prefaced by

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certain legislative findings. These recite that: (1) it is the primary responsibility of the state to ensure the health, welfare and safety of children attending both public and nonpublic schools; (2) "[f]inancial resources necessary to properly maintain and repair [deteriorating] buildings are beyond the capabilities of low-income people whose children attend nonpublic school;" (3) teachers are given incentives by the Federal Government to teach in these poor areas; (4) healthy and safe nonpublic schools contribute to the stability of urban neighborhoods; and finally (5) "[t]o insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."

B. Section 2 of the Act provides for flat tuition grants from the State Treasury to parents with family incomes of less than \$5,000 per annum who have children attending elementary or secondary nonpublic schools. The grant is in the sum of \$50 a year for children in grades 1 through 8, and \$100 in grades 9 through 12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent. The Commissioner is given "responsibility for the administration of the program" and is given authority to "promulgate such regulations as are necessary to carry out the provisions of this article." This section is entitled "Elementary and Secondary Education Opportunity Program."

Section 2 is prefaced by legislative findings that (1) "[t]he vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their chil-

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dren"; (2) the Supreme Court of the United States has recognized this "right" of selection, but the "right" is diminished or denied to children of poor families whose parents have the least options in determining where their children are to be educated; (3) any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs which would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education; and (4) it is a legitimate purpose for the State to partially relieve the financial burdens of parents who provide a nonpublic education for their children.

C. Sections 3, 4 and 5 provide that an individual shall be entitled to subtract, for State income tax purposes, from his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent.⁶ This exclusion may be taken only by parents with adjusted gross incomes of from \$5,000 to \$25,000 who do not receive a tuition assistance payment under Section 2. The exclusion would be as much as \$1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers apparently as shown in note 6, *supra*. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

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This part of the Act is prefaced by legislative findings (§ 3) that (1) statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions; (2) nonpublic educational institutions are entitled to a tax exempt status by virtue of legislation which has been sustained by the courts; (3) by their existence, such educational institutions relieve the taxpayers of the State of the burden of providing public school education for the children who attend nonpublic schools; (4) tax laws also authorize deductions for education related to employment; and (5) similar modifications of Federal adjusted gross income should also be provided to parents for tuition paid to nonpublic schools.

We have stated the legislative findings offered in support of each part of the statute in detail because we wish to make it clear that we accept these findings, except where they purport to state principles of applicable constitutional law. They sum up legislative purposes which are cast as secular in intent. Thus, we must start with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption that the Legislature intended to provide a quality education for all children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption that the Legislature intended to provide a quality education for all children and to nurture a pluralistic society by giving money from the State Treasury to poor parents for tuition in nonpublic schools. And lastly we must assume that taxpayers as a body have, indeed, been relieved up to now of the burden of providing public school education for the children who attend nonpublic schools.

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In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support. If that is constitutionally permissible, it is a worthy objective and one that should not be lightly set aside in the alleged interest of public education. Both public and nonpublic education can exist side by side. Neutrality forbids discrimination in favor of one system over the other.

Whether the main reason for this *legislative* concern is the fear that an intolerable financial burden will be cast upon the public schools if the nonpublic schools do go under, or whether the main reason is the survival of religious education, is not the particular *judicial* concern. We must weigh not only the purpose of the legislation but its effect on the traditional separation of Church and State in this country. As to the former, we accept the legislative statements. As to the effect, we must exercise the judicial function of interpreting what effect the legislation will have upon areas protected from invasion by the constitutional guaranty.

This is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their rights to the free exercise of religion. The other group, equally dedicated, believes that encroachment of Government in aid of religion is as dangerous to the secular state as encroachment of Government to restrict religion would be to its free exer-

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cise. Since the policy of separating Church from State is not merely one of policy but of constitutional provision, the ultimate determination of such conflicts must rest in the judicial branch. And the judges must be especially careful in this delicate area not to allow their personal predilections on policy to circumscribe their judgment as to the constitutional effect of particular legislative proposals. We must make a constitutional decision between these two worthy objectives. Yet, as an inferior federal court, we are not permitted to view the religion clauses of the First Amendment in a literal or even in an historical fashion. We have only to determine their meaning as authoritatively expounded by the Supreme Court. We shall, therefore, discuss the constitutionality of each of the three parts of the statute under the guidelines laid down by the Supreme Court, as we understand them.

I

The findings of the Legislature in respect of the needs of parochial schools in low income areas must, as we have said, be accepted as fact. For us to delve into the reasons why parochial education is stratified by the boundaries of richer or poorer districts would be improper, for that would be trenching on the prerogatives of religious denominations which must determine their own priorities and administration without State interference under the Free Exercise Clause of the First Amendment, as well as under the negative implications of the Establishment Clause. It is not to be gainsaid that slum-area parochial schools do have financial troubles. The issue is whether it is constitutional for the State to maintain them. Of the estimated 280 schools in the low income areas, which the Legislature

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seeks to help, all or practically all, it was conceded upon the argument, are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree. It is at this point that we must pause to review the history of the Establishment Clause in the courts in the light of the respective contentions of the parties.

The First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U. S. 296 [1940]; *Murdock v. Pennsylvania*, 319 U. S. 105 [1943]), provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

In *Everson v. Board of Education*, 330 U. S. 1, the Supreme Court was for the first time required to determine what was "an establishment of religion" in the First Amendment's conception (see *id.* at 29). It was there recognized by all the Justices that not simply an established church, but any law respecting an establishment of religion is forbidden and that schools teaching religion come within the scope of the clause prohibiting the "establishment of religion." The precise issue in that case, upon which the Court divided five to four, was the constitutionality of a New Jersey statute which allowed reimbursement of parents for the bus fares of children attending parochial schools as well as public schools; the particular provision was held constitutional. In view of the broad meaning attributed to the Establishment Clause by all the Justices, it is instructive to consider the limitations set upon their own decision by a majority of the Court. In the words of Mr. Justice BLACK for the majority, the "establishment of religion" clause "means at least this: . . . No tax in any

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amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 15-16. Nor is the prohibition only against a tax levy to support religious teaching. It is also against using tax-raised funds for that purpose. Mr. Justice BLACK wrote: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church" (emphasis added).

The majority of the Supreme Court did conclude, nevertheless, that the reimbursement of bus fares to parents was public welfare legislation, and that New Jersey could not be prohibited from extending its general state law benefits to all its citizens without regard to their religious beliefs. But the Court was careful to note in support of its decision that "[t]he State contributes no money to the schools. It does not support them." 330 U. S. at 18.

The general language, however, did not remove the delicacy or the difficulty of the issues raised in succeeding cases. For we are a nation which recognizes value in religion but seeks to maintain neutrality in that sphere. Neutrality is not merely a state of mind, however. Neutrality inevitably means a relationship to religion, one way or another. And thus the Court formulated a two-fold test for sustaining legislation alleged to violate the Establishment Clause: There must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *School District v. Schempp*, 374 U. S. 203, 222 (1963). The Court recognized that this test "is not easy

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to apply," but that a law which "merely makes available to all children the benefits of a general [New York State] program to lend school books free of charge" is not in violation of the Establishment Clause. *Board of Education v. Allen*, 392 U. S. 236, 243 (1968). This decision brought forth three dissents, as well as a concurrence by Mr. Justice HARLAN on the limited ground that the statute there involved "does not employ religion as its standard for action or inaction." *Id.* at 250.

The bifurcated test of intent and effect was again accepted in *Walz v. Tax Commission*, 397 U. S. 664, 669 (1970), a case to which we shall advert later. Furthermore, to the two tests was added a third, that the statute must not involve an "excessive entanglement" with religion. *Id.*

Yet, the issue of direct financial grant to parochial schools had not yet confronted the Court. Last year, such an issue was finally presented in the case of *Lemon v. Kurtzman*, 403 U. S. 602 (1971). This case is not only the most recent, but the most closely in point to the question of direct grants to primary and secondary parochial schools under Section 1 of the statute before us, as is *Tilton v. Richardson*, 403 U. S. 672, decided the same day.

The *Lemon* case involved legislative grants as supplements to teachers' salaries in parochial schools in Pennsylvania and Rhode Island. The Rhode Island statute contained a legislative finding that the quality of education available in nonpublic elementary schools was jeopardized by the rising salaries needed to attract teachers, and authorized state officials to supplement the salaries of teachers of secular subjects in those schools by direct limited pay-

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ment to the teacher, who was to teach only subjects taught in the public schools and no courses in religion. The Pennsylvania statute contained a legislative finding of rapidly rising costs in the State's nonpublic schools, and authorized reimbursement by the State to nonpublic schools of actual expenses for teachers' salaries, text books and instructional materials only in teaching secular subjects, and expressly excluded religious teaching.

Each statute, it will be seen, makes a distinction between that function of the parochial school which teaches secular subjects and that function which teaches religion, and stresses that state aid is not to be given for religious teaching. However, both the Pennsylvania and the Rhode Island statutes were struck down by the Supreme Court as violative of the Establishment Clause.

The opinion by the Chief Justice chose to hold the state legislation in violation of the Establishment Clause on the third of the three tests—excessive entanglement. This excessive entanglement was found to be of two kinds—administrative and political. The latter was based upon the prediction that continuing financial pressures on the nonpublic schools would, because of the annual nature of appropriations, generate considerable and recurring political activity to increase state aid, and that such activity would be along religious lines.

This choice of tests avoided the necessity to decide whether in *all* cases direct aid would be unconstitutional. But there is no indication, in our view, that the primary effect test, as a separate test, has been abandoned. And so far as precedent is concerned, the only direct aid to church-related institutions thus far sustained by the

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Supreme Court has been aid to hospitals, *Bradfield v. Roberts*, 175 U. S. 291 (1899) and the colleges in *Tilton*, where religious indoctrination was not a substantial purpose or activity of the church-related institutions. Nor was there any overruling in *Lemon* of various statements of the justices that direct subsidy which aids schools with a religious mission would be unconstitutional. The striking down in *Tilton* of the provision inferentially permitting use of the buildings after twenty years for religious purposes, on the contrary, appears to bring such a subsidy within the primary effect test, without regard to the excessive entanglement test. *Tilton* is discussed more fully below.

While the opinions of the Justices who wrote separately supporting the result in *Lemon* differ in reasoning, the quintessence of what was held may, perhaps, be gleaned from the sole dissenting opinion, that of Mr. Justice WHITE. 403 U. S. at 662. He stated the issue in the following terms: "Both the United States and the States urge that if parents choose to have their children receive instruction in the required secular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school. The issue is fairly joined." Mr. Justice WHITE relied strongly on the Free Exercise Clause to support his dissent, a view also urged upon us. But the rest of the Court refused to

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consider the conceded constitutional right of a parent to send his child to a parochial school as sufficient to sustain the public subsidy by the States in the face of the Establishment Clause. And Mr. Justice WHITE himself made it clear that his dissent in the Rhode Island case was based upon findings of the District Court, which he maintained were ignored by the majority; and in the Pennsylvania case, he dissented only from the holding that the statute was *facially* unconstitutional.

It is important, because of the varied reasoning of the majority, to note what Mr. Justice WHITE, as well, considered to be unconstitutional, and then to compare that formulation with the issue before us. Mr. Justice WHITE explained:

"As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional." 403 U. S. 671 n. 2.

In the case at bar, we are dealing largely with the same parochial school system that was before this Court in *Committee for Public Education and Religious Liberty v. Levitt and Nyquist*, 342 F. Supp. 439 (S. D. N. Y. April 27, 1972). The answers to interrogatories made there established that New York State construed as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious

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activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7) There seems to be no dispute that the statute here is also intended to apply to such schools.⁸

In *Tilton v. Richardson*, 403 U. S. 672 (1971), the Court held, five to four, that payments could be made under the Higher Education Facilities Act of 1963 to certain church-related colleges under one-time Federal construction grants for college facilities excluding "any facility used or to be used for sectarian instruction or as a place for religious worship or . . . primarily in connection with any part of the program of a school or department of divinity" (emphasis added). The Act permitted the Government to recover the funds granted within twenty years, if the restrictions on use of the building for religious teaching were not met. While sustaining the payments, the Court held unanimously that limiting the right of the Government to recapture the payment if the building should be used for religious purposes after twenty years was unconstitutional. It was accepted that the use of public funds for the construction of a building to be used for the teaching of religion was facially unconstitutional. Again, Mr. Justice WHITE, while suggesting that the Court in *Tilton* was rul-

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ing that payments made directly to a religious institution are, without more, not forbidden by the First Amendment, 403 U. S. at 664, nevertheless concurred in the Court's invalidation of the provision whereby the restriction on the use for religious purposes of buildings constructed with Federal funds terminates after twenty years, 403 U. S. 665 n.1. The line drawn, it seems to us, is that while an entirely separate building of a church-related college, in no way related to the teaching of religion or the housing of worship, may receive public funds, it may not receive such funds from the moment when secular and religious teaching or prayer are mixed in the same building.

Moreover, a direct grant to the parochial school is not the same as an across-the-board payment to parents of parochial school children which advances the common good as distinguished from religious good, and which equalizes the burden of the nonpublic school parent. The majority by Mr. Justice WHITE in *Allen*, *supra*, pointed out the distinction: "Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U. S. at 243-44. Mr. Chief Justice BURGER, in *Lemon*, noted that "the Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church related schools." 403 U. S. at 621. He distinguished *Everson* and *Allen* on the very ground that there state aid was provided to the student and his parents—not to the church related school. And he noted that in *Walz* the Court had warned of the dangers of direct payments to religious organizations. *Id.*⁹

In Mr. Justice BRENNAN's view, "[g]eneral subsidies of religious activities would, of course, constitute impermis-

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sible state involvement with religion." *Walz v. Tax Commission, supra*, 397 U. S. at 690.

This view is supported by history. The New York State Constitution provides in Article XI, § 3:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

Fewer than a half-dozen states omit such a provision. See 403 U. S. 647 & n. 6. While the ultimate decision in the *Tilton* case prohibited a grant for construction of a building used for religious teaching (even after twenty years), the Constitution of New York itself prohibits the granting of such funds for "maintenance," the very objective of Section 1 of the statute we are considering. While it is not our purpose to determine constitutionality under the New York Constitution—a matter reserved for the State courts—we cannot avoid being impressed, in our consideration of the guidelines of the Supreme Court, by the almost unanimous views of the states as expressed in their respective constitutions adopted by the people.

The argument is made, however, that since janitorial functions and snow removal obviously are not the teaching of religion, their neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury. The argument is bottomed on the assump-

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tion that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction. Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion. If it be argued that the subsidy would go only to the needy parochial school which has no surplus to apportion, the short answer is, of course, that such a parochial school would have more than it has now, for it does now pay from its present budget for janitor services and heat.¹⁰

The vice, moreover, is not only that the school budget as such is indivisible, but that no effort is made in this part of the statute to distinguish between secular and religious education. The janitorial service embraces cleaning the chapel, where there is one, and heat is provided to the classrooms where religion is taught. There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom. *Cf. Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 211 (1948).¹¹

Nor is the aid provided, though neutral in the sense of direct religious activity, given to any but a small class of institutions, almost all Roman Catholic, in deprived areas. It provides direct support for the maintenance of schools which teach religion.

Moreover, as Chief Justice BURGER said in *Walz, supra*, "Obviously a direct money subsidy would be a relation-

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ship pregnant with involvement," 397 U. S. at 675. The "involvement" includes the inevitable auditing of reports of expenditures for maintenance and repair which surely must include the right of the State to determine the fairness of the charges made. The determination must be made whether the expenditures were, in fact, commensurate with the amount of the grant under the formula.

And the very percentage formula (\$30 or \$40 per pupil out of the entire tuition), honestly intended to avoid use of the subsidy for religious purposes, inevitably requires an assessment of how much of the education supplied is secular and how much religious. It is argued that the Legislature was careful to allow only fifty per cent of the actual costs of "maintenance and repair," as a maximum, and that this is assurance that the maintenance grant is not for religious teaching. But the very argument invites considerations of the percentage relationship of secular to religious teaching and the relative impact of religious indoctrination. The *Tilton* approach is not possible where the school to be benefited is not merely church-related but is itself part of the religious mission. If the Legislature is to be asked to determine formulas based on religious teaching *vel non*, it invites the very excessive entanglement we were instructed to avoid in the *Lemon* case.

If public subsidy for janitorial service and heat to needy nonpublic schools is allowed, we may ask whether the next step will not be to supply desks and blackboards and ultimately part of a building on a percentage basis, on the ground that these are not religious in character. Would it not then be argued that where a building is in serious disrepair it is better not to patch it up but to build a new

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building with public funds on the ground that such would be a health and welfare grant?

Nor is the argument based on the police power of the State convincing. Education is as much an important function within the police power of a State as are health and safety. See *Brown v. Board of Education*, 347 U. S. 483, 493 (1954). The conflict of the First Amendment with the police power has been made apparent in the constitutional decisions affecting educational activity by the states. Almost any legitimate activity, except the teaching or preaching of religion itself, can be said to be within some element of police power of the State. Yet, a State law enacted in the exercise of otherwise undoubted State power may not prevail against Federal law. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225, 229 (1964). State power, as we have been instructed, cannot, in this area, leap the constitutional barrier when it uses direct, special subsidy as the means to implement such power.

The political pressures on the Legislature are bound to be strong along religious lines. As the Chief Justice said in *Lemon*: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." 403 U. S. at 623.¹²

To summarize our reluctant conclusion that we cannot sustain a direct public subsidy for the "maintenance and repair" of religious schools under the guidelines of the Supreme Court, our points of departure with the argument of the State of New York are that: (1) "No tax in any

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amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach* or practice religion." *Everson, supra*, 330 U. S. at 16 (emphasis added). We think *Tilton* does not overrule the application of the dictum to the case at bar. (2) The statute involved though concentrating on schools in deprived areas, makes no distinction between secular and religious teaching, and tax-raised funds are directly used for the maintenance of buildings which teach religion. (3) We cannot accept the view that, under present doctrine, budgets for churches, synagogues or parochial schools can be made divisible by ascribing a percentage of cost to neutral functions. (4) On the contrary, we interpret the dictum of the Supreme Court that neutral services may be afforded to parochial schools to mean simply that general services, such as transportation, secular books, free lunches and, perhaps, athletic training, visiting nurses and the like, afforded to students in *all* schools may also be made available to students in parochial schools. (5) We think that, unlike the one-time construction of new buildings as in *Tilton*, the "maintenance and repair" provisions of the New York statute involve "continuing financial" and political "relationships [and] dependencies" *Tilton, supra*, 403 U. S. at 688.¹³

In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequence to both.

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II

Section 2 of the statute provides for partial reimbursement to needy parents for the tuition they pay to send their children to parochial schools. Although the payment is to the parent, by hypothesis he is within a low annual income bracket (below \$5,000) which would make it possible that he could not afford to send his children to parochial school in the absence of a direct subsidy from the State Treasury. Indeed, it is the very assumption of the Legislature in its findings that he will use the money grant for tuition. Whether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance. The recipient is the parochial school. The source is the State tax-derived money. The parent is simply a conduit. See *Griffin v. County School Board*, 377 U. S. 218 (1964); *Griffin v. State Board of Education*, 239 F. Supp. 560, 563 (E. D. Va. 1965), *overruled on other grounds*, 296 F. Supp. 1178 (E. D. Va. 1969); *Wolman v. Essex*, 342 F. Supp. 399 (E. D. Ohio 1972).

While in the general distribution of a State aid program, as in the case of reimbursement of bus transportation to parents (*Everson, supra*), the loan of text books to students (*Allen, supra*), free lunches to children and the like, there is a distinction between a grant to the family and a grant to the parochial school, there is no such distinction where the parent is a mere conduit for a payment of tuition. In the former, the costs assumed by the State were generally borne by the parents, in the first instance, and it is they who are being reimbursed, not the school. In the case of tuition, it is the school which benefits by getting tuitions from State funds which it might otherwise not receive.¹⁴

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The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their "right" to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

These are serious arguments that cannot be disregarded, particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society.

The propagation of religious doctrine was early made the responsibility of the particular denomination in hard

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times as well as good times. We know, however, that inflation was no concern of the framers of the First Amendment, and, as individuals, we sympathize with its victims. But a State-supported church school is simply not a part of our way of life, and the payment of tuition for its pupils makes the church school a State-supported school.¹⁵

While there can be no proof either way, it is possible that among persons eligible for the tuition grant there will be not only those who now have their children in a parochial school but also some whose children now attend the public schools and whom they would transfer to a parochial school.

The implications of recognizing a "right" to the support of public funds for the expression of the free exercise of religion are, moreover, staggering. Religious belief and the right to practice religion, including the teaching of the young, are precious rights to be preserved unto death itself. But a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment. If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca. These are all "rights" to the free exercise of religion that cannot be denied, and from the exercise of which the poor may be excluded by circumstance.

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If the Founding Fathers had any intentions about religion it was surely to separate the concern of the Government from the concern of the individual religious community. That is why we have the double-edged religion clauses of the First Amendment—no law respecting the establishment of religion or the free exercise thereof. Each sector must not only respect its own proper functions. Each must also support them. This appears to be the essence of the voluntarism requirement of the First Amendment; see HARLAN, J., concurring in *Walz, supra*, 397 U. S. at 696.

The examples cited by the State to support its argument for tuition reimbursement to poor parents deal with the striking down of exactions by the State of money from the poor as a condition to their exercise of particular constitutional rights, like the right to sue in the courts for divorce without paying court costs, *Boddie v. Connecticut*, 401 U. S. 371 (1971), and the right to vote without paying a poll tax, *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966). So, too, *Sherbert v. Verner*, 374 U. S. 398 (1963) held invalid the denial of unemployment benefits where the free exercise of religion was inhibited. The statute here, on the contrary, affirmatively establishes benefits for the free exercise of religion. No case has been cited where an affirmative cash subsidy to advance the constitutional right to the free exercise of religion was allowed.

Nor do we ignore the argument forcefully put by the State and by representatives of the able majority leader of the State Senate. The possible closing of Catholic parochial schools on a large scale would cast a heavy burden on an already overburdened State. But we must

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recognize, within the guidelines set by the Supreme Court, that economic hardship alone is not enough to overcome the strictures of the First Amendment. The Court in *Lemon, supra*, accepted the legislative findings of economic stringency in the parochial schools, with the obvious, if not fully articulated, potential effect on the State finances of Rhodes Island and Pennsylvania. It, nevertheless, struck down what were clearly economic measures to help the fiscal condition of the nonpublic schools with the possible consequence of forced absorption of their burdens by the States.

The argument, like many good arguments, stretches the hand to the breaking point. For it must be tested for validity against contingencies which could occur and which would have a strong effect on legislative action, not only because of religious pressures on the legislators, but because of the conviction that the public treasury has more to gain by supporting church schools directly than by not supporting them.

If conditions worsen, it would be proper, under this argument, to pay the salaries of the secular teachers. But that is what has just been invalidated by the Supreme Court. The argument would logically admit of circumstances, honestly based upon economic need, which would support the grant of public funds, at least for secular education, in geographic areas where there were not enough parochial schools, and where the pressure of population would otherwise cause great hardship to the neighborhood public schools. Once we embark upon such a course, we fear that the meaning of the Establishment Clause will be diluted to the point where the State will support the parochial schools with the inevitable control by the State

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built into an anomalous situation. That is a condition devoutly not to be wished. The proponents of this legislation will probably affirm that they are willing to take their chances on such an eventuality and that they would rather have the funds in hand. But it is the peculiar function of the judicial branch to remain unmoved by current desires, not in the sense of usurping the province of legislatures, but in viewing basic constitutional provisions as outliving the generation of men which has to interpret them.¹⁸

III

The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools *in the State*. Second, it does not involve a subsidy or grant of money *from the State Treasury* as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. See *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the ongoing political activity as likely, in our opinion, to cause division on strictly religious lines.

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We shall explain our reasons briefly.

There has always been a sharp distinction in the history of the United States between direct grants of public funds to religious institutions, generally prohibited, and tax exemption for religious institutions, generally permitted. This indirect aid to religious institutions has largely taken two forms, exemption from local property taxes and the like, and income tax exemptions for contributions to religious institutions. The former method was lately before the Supreme Court in *Walz*, *supra*. The latter method has never been challenged in the Supreme Court. As the Court noted in *Walz*, the real property tax exemption provision for churches is two hundred years old. The acquiescence in the practice by the people, the historical absence of religious divisiveness, and the exemption's ancient origin were considered to lend support to its exclusion from the restraints of the religion clauses of the First Amendment.

In *Walz*, the Court recognized that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . ." 397 U. S. at 674; yet the New York statute granting to churches as well as other educational and civic institutions exemption from real property taxes was sustained. The Court also noted in *Walz* that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

It certainly can be argued that if the power to tax is the power to destroy, the power not to tax is the power to support. The Supreme Court has not accepted that view, and has rejected the argument that exemptions do not differ from subsidies as a matter of economics.

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Our distinguished colleague, Judge HAYS, in his dissenting opinion assumes constitutional invalidity because the "purpose and effect of the statute [Part III] are . . . to subsidize religious training for children." Why, then, it may be asked, does not an income tax deduction for a contribution to a church "subsidize" religious worship for parents? If, indeed, "there is no essential difference between a parent's receiving a \$50 reimbursement for tuition paid to a parochial school and his receiving a \$50 benefit because he sends his child to a parochial school," then there should be no essential difference between a parent's receiving a \$50 "reimbursement" for a payment to his parish church and his receiving a \$50 "benefit" for the same payment. As Judge HAYS states it, "in both instances the money involved represents a charge made upon the state for the purpose of religious education." With great respect, we paraphrase this to say that, in our illustration as well, it could be said that the money involved represents a charge made upon the State for the purpose of denominational worship. Yet we have abided this very condition in our taxing system for many years, although we know that some denominations conduct church-related Sunday Schools or even weekday afternoon classes in religion.

Whether the distinction is based on logic, history or simply on an authoritative guideline set by the Supreme Court, we may approach our difficult task with the distinction between subsidy and tax exemption in mind. It cannot be a perfect guide, for the statute involved in *Walz* gave real property tax exemption to a great many institutions, not only churches, there was no question of arbitrary classification, and alleged State involvement with religion was at least equivocal. On the other hand, in favor of its validity

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is the circumstance that under Section 3 of our statute, the income tax exemption (which is in effect a tax *credit* since the exemption is not intended to equal the parents' outlay) is to *individuals*, not to churches or church schools, a step removed. This kind of income tax relief, while not as old as property tax exemption because the constitutional income tax law itself is relatively modern, has been on the Federal statute books for more than half a century. It has been a consistent legislative policy ever since the 1917 Revenue Act for the Congress to permit the deduction of so-called charitable contributions from personal income.¹⁷ This has always included direct gifts to churches. The purpose is no doubt to encourage such contributions. 5 J. Mertens, *Law of Federal Income Taxation* § 31.01 (1969); *Bliss v. Commissioner*, 68 F. 2d 890 (2 Cir. 1934), *aff'd* 293 U. S. 144 (1934).

We think that, aside from the "equal protection" problem which we do not pass upon, the credit against gross income of a fixed amount if tuition is paid to nonpublic schools, does not sponsor, or render forbidden financial support to church schools, at least in the limited form in which relief is given here. Credit is allowed not only to parents who pay tuition to a religious school but also to any nonprofit, nonpublic secular school. The table in the statute is geared roughly to the tax brackets and the rate of tax imposed on each bracket. The result ranges from a small, almost token, forgiveness to a family which attains an adjusted gross income of almost \$25,000 to a forgiveness roughly approximating the tuition cost of \$50 per child for a family in the lowest bracket. A memorandum prepared by Senator Brydges indicates that a family with three children in a nonpublic school would get a net benefit annually ranging from \$150

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if the family has an adjusted gross income of less than \$9,000, to \$36 if the family has an adjusted gross income of \$24,999. The benefit is inverse to income. And we believe the Legislature has power to decide between allowing deductions and allowing credits.¹⁸

It seems to us unlikely, at least in the absence of strong proof, that a person having \$6,000 to \$9,000 per annum as an adjusted gross income would take his forgiveness or windfall, and hand it back to the parochial school as additional tuition. He would, more likely, compensate himself for the tuition paid in an amount which would otherwise have gone to the State for income taxes. Thus, it is likely that while the State loses revenue, as it does generally in allowing charitable deductions, it does not aid the parochial school, as it may, indeed, do when it allows deductions for direct contributions to the church. If, in fact, persons in a somewhat higher bracket should forgo the forgiveness and turn over the tax saving to the church, that would be a voluntary act, not different in kind from an ordinary church contribution. Indeed, it is to be hoped that at least part of the costs of educating poor children will come from this source.

Once we have hurdled the constitutional barrier to income tax benefit for contributions directly made to churches, as we believe we must, there is not much further to travel. It is true that the argument may be advanced as the dissenting opinion does that the parent receives a consideration in the education of his child, while there is no *quid pro quo* in a contribution to a church. And we understand that the Federal tax authorities do scrutinize contributions of parochial school parents with that yardstick. See *Fausner v. Commissioner*, 55 T. C. 620 (1971).

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We are not dealing, however, with the interpretation of a revenue act but with an inquiry upon the limitations of the power of a State Legislature under the Federal Constitution. As a Court, we may not pass on questions of religious values or even adumbrate the moral or religious "consideration" that may accrue to the donor of a gift to the church of his choice.

We put it more simply in practical terms. If a parishioner made a contribution to his parish, and the parish school were entirely free of tuition, would he be denied his income tax deduction because his child attended that school? Opinions may differ on the interpretation of present statutes, but it seems to us likely that an affirmative formulation by the Legislature would be constitutional.

We have not been asked to pass upon the constitutionality of part three on "equal protection" grounds, and we do not do so, *cf. Everson, supra*, 330 U. S. at 4-5.¹⁰ Putting such argument to one side, we think that the pressure on legislators to amend the income tax law is likely to be more from nonpublic school parents as a group rather than from parents of a single religious denomination. The principles of equity rather than of religious aid will probably be put to the fore if further liberalization by the Legislature is sought. And that we believe would not make for an inevitable excessive entanglement with religion in the legislative halls. As to administrative entanglement under part three of the statute, we see none beyond checking with the school simply to determine whether the tuition claimed to have been paid was actually paid.

We note, moreover, that the secular purpose as well as its effect is strong. The lightening of the tax burden of those

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who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute. 1 J. Mertens, *supra*, § 4.09. As we have said, however, we do not now deal with the "equal protection" argument, the reasonableness of the classification by those standards, or whether there is an appropriate governmental interest suitably furthered by the different treatment. See *Police Department v. Mosley*, — U. S. —, 92 S. Ct. 2286 (1972).

We hold only that Section 3 of the statute is not in conflict with the First Amendment Establishment Clause, as applied to the states through the Fourteenth Amendment.

We also find Section 3 of the statute separable from the parts found to be unconstitutional. The statute itself contains a separability clause (§ 11). And we are not required to invalidate the entire Act. See *Tilton, supra*, 403 U. S. at 683-84; *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210, 234 (1932).

A permanent injunction will be issued against the enforcement of Sections 1 and 2 of the statute. Judgment will be entered accordingly, pursuant to Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay. A permanent injunction against enforcement of Section 3 of the statute will be denied. The complaint so far as it relates to Section 3 of the statute, will not be dismissed, however. The parties may move for summary judgment or for an expedited trial.

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An order will be settled on notice.

The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Dated: October 2, 1972.

PAUL R. HAYS, *U. S. C. J.*

JOHN M. CANNELLA, *U. S. D. J.*

MURRAY I. GURFEIN, *U. S. D. J.*

FOOTNOTES

¹ Parents of children enrolled in nonpublic schools have been permitted to intervene as parties defendant. Similar permission was granted to Hon. Earl W. Bridges, Majority Leader and President *pro tempore* of the New York State Senate.

² The sections of the Act not under attack provide for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and provide for the purchase of nonpublic school buildings by public school districts where the nonpublic school has been closed (Sections 6-10).

³ 20 U. S. C. § 425 deals with the partial forgiveness by the Federal Government of certain educational loans to students who become teachers in "a school in which there is a high concentration of students from low-income families," and provides a method for determining that criterion.

⁴ The amount of the grants is limited to "fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner."

⁵ Because of the suggestion that it was essential for the State to know promptly whether it could disburse the funds as provided in Section 1, we announced in a *per curiam* opinion our holding that this Section was in violation of the First Amendment as applied to the states by the Fourteenth Amendment. This opinion elaborates that decision.

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⁶ The table is as follows:

<i>If New York adjusted gross income is:</i>	<i>The amount allowable for each dependent is:</i>
Less than \$9,000	\$1,000
9,000—10,999	850
11,000—12,999	700
13,000—14,999	550
15,000—16,999	400
17,000—18,999	250
19,000—20,999	150
21,000—22,999	125
23,000—24,999	100
25,000 and over	-0-

Estimated Net Benefit to Family

<i>One Child</i>	<i>Two Children</i>	<i>Three or more</i>
\$50.00	\$100.00	\$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

⁷ *Id.* at 15 (BLACK, J.), see *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).

⁸ The plurality opinion in *Tilton*, *infra*, by the Chief Justice makes it clear that the plurality were convinced that, with respect to the four colleges there involved, "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities." 403 U.S. at 687. On the other hand, aid to primary and secondary parochial schools is supported in New York on the very ground that parents have the right to choose parochial school education for their children as an important incident to their free exercise of religion, which includes the right to provide for religious indoctrination of the children through the parochial school.

⁹ The impact of *Lemon* and *Tilton* on direct cash payments is suggested by two memorandum decisions filed on the same day. The Court vacated and remanded, for consideration in the light of *Lemon* and *Tilton*, *Kervick v. Clayton* and *Hunt v. McNair*, 403 U.S. 945 (1971). *Kervick* had upheld construction loans under the *New Jersey Educational Facilities Authority Law*, 56 N. J. 523, 267 A. 2d

Majority Opinion

503 (1970). *Hunt* had upheld the issuance of bonds to pay off the indebtedness of a Baptist College under the Educational Facilities Authority Act, 255 S.C. 71, 177 S.E. 2d 362 (1970).

The Supreme Court of New Jersey, after the remand, held valid the statute which creates an Educational Facilities Authority to sell bonds and lend the proceeds to educational institutions, without pledging the credit of the State. *Clayton v. Kervick*, 59 N.J. 583, 285 A. 2d 11 (1971). But it concluded that even with respect to loans, as distinguished from grants, a facility may not be used for sectarian instruction or as a place of religious worship even after repayment of the loans; and no college may participate if it restricts entry on racial or religious grounds or requires all students gaining admission to receive instruction in the tenets of a particular faith. *Id.* at 20-21.

The Supreme Court of South Carolina also upheld its loan statute which provided that the facilities involved shall not be used for sectarian instruction. *Hunt v. McNair*, 187 S.E. 2d 645, 652 (1972).

¹⁰ The State urges upon us for consideration some language of Chief Justice BURGER in *Tilton*, *supra*, to the effect that "[c]onstruction grants surely aid these institutions [the church-related colleges] in the sense that the construction of buildings will assist them to perform their various functions." 403 U.S. at 679. The State notes that this form of governmental assistance was upheld.

Taking it in its literal sense the argument from the language is a fair one. But the quoted language must be read in the light of the Chief Justice's actual holding that use of the buildings for religious purposes, even after twenty years, was unconstitutional.

¹¹ The Supreme Court of Wisconsin recently held to be in violation of the Establishment Clause of the First Amendment a statute which authorized the contracting for purchase of dental education by the University [Marquette] dental school because it permitted the use of funds paid under the contract "in support of the operating costs" of the university without limiting the use of such funds exclusively to the providing of dental education in the dental school of the university. *State ex rel. Warren v. Nusbaum* (State No. 266, July 7, 1972). This result was reached even though the Court recognized that the very nature of dental education assures the completely secular nature of the teaching of dentistry.

¹² The brief of Senator Brydges argues that "[i]t is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its [*sic*] debates" (p. 37). We think that the Supreme Court, in its emphasis on "excessive entanglement" did not intend to limit legislative debate, but

Majority Opinion

rather to strike down legislation which would encourage future divisive debate on religious lines. Whether this constitutional test should be modified is not within the province of this District Court. The argument can be made only to the Supreme Court.

¹³ It must be noted that the colleges involved in *Tilton* were not directly controlled by the church; the elementary and secondary schools covered by the New York statute are controlled by a religious hierarchy.

¹⁴ Senator Brydges' brief argues as "history" (p. 16) that with respect to Section 3209 of the N.Y. Education Law, the New York Attorney General in 1935 ruled that it applied to children attending parochial schools as well as public schools. We agree that the affirmative duty of "public welfare officials" to furnish "indigent children with suitable clothing, shoes, books, food and other necessities to enable them to attend upon instruction as hereinbefore required by law" does not require the denial of these benefits to needy children who attend parochial schools. But there is nothing in that statute concerning the payment by the state of tuition for needy children. The Education Law involved a general grant to all which did not include tuition.

As to tuition, there may be situations where special circumstances make attendance at public schools impractical as in the case of orphan schools, see *Sargent v. Board of Education*, 177 N.Y. 317 (1904); Indian schools, Education Law, art. 83; and schools for deaf and blind children, *id.* art. 85. But those sections are not relevant to normal children who can attend the public schools.

¹⁵ In the language of Chief Judge LORD in *Lemon v. Sloan*, 340 F. Supp. 1356, 1364 (E.D. Pa. 1972): "The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid those schools."

¹⁶ (a) A similar conclusion was recently reached by a three-judge court in the Eastern District of Ohio. *Wolman v. Essex*, 342 F.Supp. 399 (E.D. Ohio 1972). There moneys had been appropriated for "educational grants to parents" and for the provision of neutral, non-religious "materials and services" for pupils attending nonpublic schools. The statute was held to be in violation of the Establishment Clause of the First Amendment.

(b) A Pennsylvania Act providing for reimbursement of tuition payments to parents whose children attend nonpublic schools was declared unconstitutional in spite of a legislative declaration that parents who send their children to nonpublic schools assist the State

Majority Opinion

in reducing the rising cost of public education, and that if children now attending nonpublic schools were forced to transfer to public schools "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state" *Lemon v. Sloan, supra* at 1366 (three-judge court). Chief Judge LORD wrote: "If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so." *Id.* at 1365.

¹⁷ Revenue Act of 1917, c.63, § 1201(2), 40 Stat. 331. That statute allowed as a deduction, "[c]ontributions . . . made to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes."

¹⁸ A deduction of \$150 for a person in a 6% tax bracket (\$7,000 to \$9,000) would have given him only a nine dollar benefit.

¹⁹ There the Court refused to consider whether the apparent exclusion of "private schools run for profit" violates the Equal Protection Clause of the Fourteenth Amendment, because the statute was not challenged on that ground.

APPENDIX "B"
Dissenting Opinion

HAYS, *Circuit Judge*, in part concurring in the result; dissenting in part:

I am in agreement with the view of my colleagues that the part of the state statute (N. Y. Laws of 1972, c. 414) providing for grants to private schools for the maintenance of buildings cannot survive a challenge based on the Establishment Clause and the cases decided under it. *Tilton v. Richardson*, 403 U. S. 672 (1971); *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Walz v. Tax Comm'n*, 397 U. S. 664 (1970); *Bd. of Education v. Allen*, 392 U. S. 236 (1968); *Everson v. Bd. of Education*, 330 U. S. 1 (1947). I agree with Judge GURFEIN's view that the part of the statute providing for flat tuition grants to low-income parents is also unconstitutional. In addition to the cases previously cited see also *Wolman v. Essex*, 342 F. Supp. 399 (E. D. Ohio, 1972) (three judge court); *Lemon v. Sloan*, 340 F. Supp. 1356 (E. D. Pa., 1972) (three judge court). I therefore concur in the result reached by Judge GURFEIN as to these aspects of the statute.

I dissent from the court's judgment concerning section 3 of the state act. I believe that that section, which provides for tax benefits with respect to tuition paid by the taxpayer for children attending religious schools, is also unconstitutional.

The purpose and effect of this provision of the statute are the same as the second portion, i.e., to subsidize religious training for children.¹ Both sections aim to reimburse parents who have chosen to send their children to religious schools. As Mr. Justice JACKSON said:

Dissenting Opinion

"The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination." *Everson v. Bd. of Education*, 330 U. S. at 24 (JACKSON, J. dissenting).

And "[w]hat may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." *Abington School District v. Schempp*, 374 U. S. 203, 230 (DOUGLAS, J. concurring).²

The benefits of the tax exemption allowed by section 3 are of the same nature as those accorded under the tuition reimbursement provisions of section 2. There is no essential difference between a parent's receiving a \$50 *reimbursement* for tuition paid to a parochial school and his receiving a \$50 *benefit because* he sends his child to a parochial school. In both instances the money involved represents a charge made upon the state for the purpose of religious education.

The exemption of church property from ordinary taxation provides no analogy for the tax benefits of the present statute. The schools in the nonprofit nonpublic category in New York State are tax-exempt, N. Y. Real Prop. Tax Law § 421(1) (a) (McKinney Supp. 1971), and that status is not in dispute in this case. In *Walz v. Tax Commission*, *supra*, the Court believed nearly two centuries of acquiescence in and approval of such exemptions lent support to the proposition that the exemptions did not violate the Establishment Clause. 397 U. S. at 680. Moreover, the Court noted in *Walz* that the State had not "singled out one particular church or religious group or even churches as such; rather it [had] granted exemption to all houses of worship within a broad class of property owned by non-profit, quasi-public corporations" *Id.* at 673. Here, as the three judge

Dissenting Opinion

panel pointed out in *Wolman v. Essex*, *supra*, "[t]he limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute." 342 F. Supp. at 412. Finally, the *Walz* court held (p. 674) that:

"Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

The *Walz* decision, as the Court said in *Lemon v. Kurtzman*, *supra*, p. 614, "tended to confine rather than enlarge the area of permissible state involvement with religious institutions"

Nor does the present case concern the tax deductibility of religious contributions. Such contributions, even to church schools, are deductible under New York law, N. Y. Tax Law § 360 (10b) (McKinney 1966), and they would not be affected by the statute under scrutiny. Even assuming that tax deductions for contributions to religious schools are constitutional—a point not yet passed upon by the Supreme Court—we are not dealing with such deductions in the present case. A payment for services rendered is not a contribution, and such payments are not deductible. As the court said in *DeJong v. Commissioner*, 36 T. C. 896, 899-900 (1961), *aff'd* 309 F. 2d 373 (9th Cir. 1962):

"We are satisfied on the record before us that at least a portion of the \$1,075 paid by petitioners to the society was in the nature of tuition fees for the education which the society was expected to furnish to petitioners' children and was not in fact a true charitable

Dissenting Opinion

contribution. Payments pledged and made by parents in the circumstances disclosed by the evidence were not voluntary and gratuitous contributions motivated merely by the satisfaction which flows from the performance of a generous act; they were induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the society's school."

See also *McLaughlin v. Commissioner*, 51 T. C. 233 (1968); *Fausner v. Commissioner*, 55 T. C. 620 (1971).

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.³

As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature would not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210, 234 (1932). It is obvious that the New York state legislature would not have enacted section 3 benefiting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

For the foregoing reasons I respectfully dissent from the determination of the court as to the constitutionality of section 3.

Dissenting Opinion

FOOTNOTES

¹ Although section 3 is made applicable to parents whose children attend any nonprofit nonpublic school, the overwhelming majority of these parents are sending their children to religious schools where sectarian indoctrination takes place. According to the Fleischman Commission report, religious schools make up 93.5% of New York State's nonpublic schools. The remaining 6.5% consist of both profit-making and non-profit-making private schools. Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary education, "The Collapse of Nonpublic Education: Rumor or Reality?", Vol. 1, pp. 1-6. See Transcript in *Pearl v. Nyquist*, p. 64. The profit-making schools are not, of course, covered by section 3.

² In the context of racial discrimination, grants to schools, students or their parents to avoid the commands of the Fourteenth Amendment have been consistently struck down. See *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La., 1961), aff'd. 368 U.S. 515 (1962); *Lee v. Macon County Bd.*, 267 F. Supp. 458 (M.D. Ala., 1967) aff'd. sub nom. *Wallace v. United States*, 389 U.S. 215 (1967); *Brown v. South Carolina State Bd.*, 96 F. Supp. 199 (D.S.C., 1968) aff'd. 393 U.S. 222 (1968); *Coffey v. State Educ. Finance Comm'n*, 296 F. Supp. 1389 (S.D. Miss., 1969).

³ The following table shows the estimated net benefits to taxpayers under section 3. The information is taken from the memorandum which accompanied the bill. It was submitted to each legislator by Senator Brydges and was cited by the majority ante p. ____.

If Adjusted Gross Income is	Income Exclusion Per Pupil is	Estimated Net Benefit to Family		
		One child	Two children	Three or more
Less than \$9,000	\$1,000	\$50.00	\$100.00	\$150.00
\$9,000 — 10,999	850	42.50	85.00	127.50
11,000 — 12,999	700	42.00	84.00	126.00
13,000 — 14,999	550	38.50	77.00	115.50
15,000 — 16,999	400	32.00	64.00	96.00
17,000 — 18,999	250	22.50	45.00	67.50
19,000 — 20,999	150	15.00	30.00	45.00
21,000 — 22,999	125	13.75	27.50	41.25
23,000 — 24,999	100	12.00	24.00	36.00
25,000 and over	0	0	0	0

APPENDIX "C"

Final Judgment Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Plaintiffs,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Defendants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-defendants,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President *Pro Tem* of the New York State Senate,

Intervenor-defendant.

Final Judgment Appealed From

Plaintiffs' motion for the convening of a three-judge District Court pursuant to 28 U. S. C. §§ 2281, 2284 having come on to be heard on June 20, 1972 before the Hon. MURRAY I. GURFEIN, United States District Judge, and the parties having conceded at that time that this action required the convening of a three-judge District Court, and Judge GURFEIN having set the matter down for a hearing during the week of July 3, 1972 upon a representation that there were no factual issues involved; and the case having thereafter come on to be heard on the merits on July 6, 1972 before Judge GURFEIN, the Hon. PAUL R. HAYS, United States Circuit Judge, and the Hon. JOHN M. CANNELLA, United States District Judge, and all parties having submitted briefs and presented oral argument; and the Court, after due deliberation, having concluded on July 21, 1972 that Section 1 of Chapter 414 of the 1972 Laws of New York is in violation of the Establishment Clause of the First Amendment to the United States Constitution, and the Court having set forth the reasons for this decision in an opinion dated October 2, 1972; and the Court having further concluded in its opinion of October 2, 1972 that Section 2 of Chapter 414 is unconstitutional and that Sections 3, 4 and 5 of Chapter 414 are not in violation of the Establishment Clause of the First Amendment, Judge HAYS dissenting with respect to Sections 3, 4 and 5 of Chapter 414; and the Court having directed that judgment be entered, permanently enjoining enforcement of Sections 1 and 2 of Chapter 414; and the Court having further stated that the parties may move for summary judgment or for an expedited trial with respect to Section[s] 3 [and 4 and 5] of Chapter 414; and defendants and intervenor-defendants having duly moved for summary judgment dismissing the complaint with respect to Sections 3, 4 and 5 of Chapter 414;

Final Judgment Appealed From

Now, upon all of the proceedings heretofore had herein, it is hereby

ORDERED, ADJUDGED AND DECREED that Section 1 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair; and it is further

ORDERED, ADJUDGED AND DECREED that Section 2 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any tuition payments heretofore or hereafter made to nonpublic elementary and secondary schools; and it is further

Final Judgment Appealed From

ORDERED, ADJUDGED AND DECREED that Sections 3, 4 and 5 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York be, and it hereby is, granted; and it is further

ORDERED that the complaint, insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York, be, and it hereby is, dismissed.

Dated: New York, New York, October 20, 1972.

.....
PAUL R. HAYS,
U. S. C. J.

.....
JOHN M. CANNELLA,
U. S. D. J.

.....
MURRAY I. GURFEIN,
U. S. D. J.

Entered:

.....

Final Judgment Appealed From

STIPULATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY *et al.*,

Plaintiffs,

against

EWALD B. NYQUIST *etc. et al.*,

Defendants,

and

GERALDINE M. BOYLAN *et al.*,

Intervenor-Defendants,

and

SENATOR EARL W. BRYDGES *etc.*,

Intervenor-Defendant.

72 Civ. 2286.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that they represent all parties to this action, that they have read the above Order and Judgment

Final Judgment Appealed From

and that it is approved as to form and may be entered without further proceedings.

Dated: New York, New York, October 19, 1972.

.....
Attorney for Plaintiffs

LOUIS J. LEFKOWITZ

By
Attorney for Defendants

DAVIS POLK & WARDWELL

By
Attorneys for Intervenor-Defendants
Boylan, Cherry, Ducey, Ferguson,
Ferrarella, Roos and Ruiz

JOHN F. HAGGERTY and
LOUIS P. CONTIGUGLIA

By
Attorneys for Intervenor-Defendant
Senator Earl W. Brydges

APPENDIX "D"

**Notice of Appeal to the Supreme Court of the
United States**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Plaintiffs,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Defendants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Defendant.

*Notice of Appeal to the Supreme Court
of the United States*

Sirs:

Notice is hereby given that defendants Ewald B. Nyquist, Arthur Levitt, and Norman Gallman hereby appeal to the Supreme Court of the United States from so much of the Order and Judgment entered in this action on October 20, 1972 as declares that sections 1 and 2 of chapter 414 of the New York Laws of 1972 violates the Establishment Clause of the First Amendment to the Constitution of the United States and permanently enjoins "the defendants and their agents and all persons acting for or on behalf of the State of New York * * * from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair" and also permanently enjoins "the defendants and their agents and all persons acting for or on behalf of the State of New York * * * from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or in reimbursement of any tuition payments heretofore or hereafter made to nonpublic elementary and secondary schools."

A52

*Notice of Appeal to the Supreme Court
of the United States*

This appeal is taken pursuant to 28 U. S. C. § 1253.

Dated: Albany, New York, November 3, 1972.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
*Attorney for Defendants
Nyquist, Levitt and Gallman*
By

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APPENDIX "E"**Chapter 414, Laws 1972**

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of law income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, with an immediate effective date, except that sections 7, 8 and 9 were effective July 1, 1972.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12**HEALTH AND SAFETY GRANTS FOR NONPUBLIC SCHOOL CHILDREN**

Section 549. *Legislative findings.*

550. *Definitions.*

551. *Apportionment.*

552. *Applications, reports, regulations.*

553. *Installments.*

§ 549. *Legislative findings. The legislative hereby finds and declares that:*

1. *The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.*

Chapter 414, Laws 1972

2. The state discharges this responsibility to public school children through substantial amounts of per public financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five, which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but none the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

Chapter 414, Laws 1972

§ 550. *Definitions. In this article:*

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000 (d), (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).

3. "Base year" shall mean the school year immediately preceding the current year.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.

5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

Chapter 414, Laws 1972

6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session during such year.

§ 551. Apportionment. 1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

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2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 552. Applications, reports, regulations. Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this acticle. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. Installments. The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July

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first, nineteen hundred seventy-one such apportionment shall be made in one payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§2. Such law is hereby amended by inserting therein a new article, to be article twelve-A to read as follows:

ARTICLE 12-A

ELEMENTARY AND SECONDARY EDUCATION
OPPORTUNITY PROGRAM

Section 559. Legislative findings

560. Short title.

561. Definitions.

562. Tuition reimbursement payments to parents.

563. Commissioner; powers.

§ 559. *Legislative findings. The legislative hereby finds and declares that:*

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

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2. *The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.*

3. *Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.*

4. *In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.*

5. *An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition reimbursement for parents of low income, in order to provide partial assistance in meeting the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.*

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§ 560. *Short title.* This article shall be known as the "Elementary and Secondary Education Opportunity Program".

§ 561. *Definitions.* The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred

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four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000 (d), and (iii) which is entitled to a tax exemption under section five hundred one(a) and five hundred one(c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar year exclusive of July and August.

§ 562. Tuition reimbursement payments to parents. 1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one

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through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified

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statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.

§ 563. Commissioner; powers. The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.
2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

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3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subsection (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades

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one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragraph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

<i>If New York adjusted gross income is:</i>	<i>The amount allowable for each dependent is:</i>
<i>Less than \$9,000</i>	<i>\$1,000</i>
<i>9,000—10,999</i>	<i>850</i>
<i>11,000—12,999</i>	<i>700</i>
<i>13,000—14,999</i>	<i>550</i>
<i>15,000—16,999</i>	<i>400</i>
<i>17,000—18,999</i>	<i>250</i>
<i>19,000—20,999</i>	<i>150</i>
<i>21,000—22,999</i>	<i>125</i>
<i>23,000—24,999</i>	<i>100</i>
<i>25,000 and over</i>	<i>-0-</i>

(2) *Husband and wife.* In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

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(3) *Definitions.* (A) "Tuition", as used in this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252,42 U. S. C. § 2000 (d) and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state tax commission may require.

(C) "Regular school year" as used in this subsection shall mean the months of the taxable year exclusive of July and August.

(4) *Additional information.* Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.

§ 6. *Legislative findings.* The legislature hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils,

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the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps , fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

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a. Definitions. As used herein:

1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.

2. borough shall mean any borough of the city school district of the city of New York.

3. aid ratio shall mean the higher of the actual aid ratio established for such district or borough, or thirty-six per centum.

b. Computation. The amount to be apportioned shall be the product of:

1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and

2. the aid ration of such school district or borough.

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ration for each borough.

d. Any apportionment as herein computed shall be subject to regulations promulgated by the commissioner and shall not be deducted in determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year next succeeding such year.

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§ 8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively, as follows:

1. No schoolhouse shall be erected, *purchased*, repaired, enlarged or remodeled in any school district except in a city school district in a city seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specification shall show in detail the ventilation, heating and lighting of such buildings.

In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may prescribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousand dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set

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forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection *or purchase* of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exits upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection *or purchase* of any school building or addition thereto or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of

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education shall not approve the plans for the erection or purchase of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment accessibility; soil conditions; initial and ultimate costs.

§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for an appraisal of such buildings as school buildings and the land on which they are situated as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two

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hundred thirty-four of the laws of nineteen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, *purchase of existing structures*, for site purchase and improvement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs incidental to such construction or reconstruction, or *purchase of existing structures*.

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a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction *and the purchase of existing structures* the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven through nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the cost of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction *and the purchase of existing structures*

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may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two, and the provisions of paragraph (14) of subsection (c) of section six hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.

IN THE

MICHAEL RODAK

Supreme Court of the United States

October Term, 1972

No. **82-929**

**PRISCILLA L. CHERRY, NORA H. FERGUSON
and ADAMINA RUIZ,**

Appellants,

vs.

**COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEY, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAILLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NRIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,**

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

JURISDICTIONAL STATEMENT

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IN THE
Supreme Court of the United States

October Term, 1972

No.

PRISCILLA L. CHERRY, NORA H. FERGUSON
and ADAMINA RUIZ,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants submit this Statement to show that this Court has jurisdiction of their appeal from so much of the judgment of the United States District Court for the Southern District of New York as declares Section 2 of Chapter 414 of the 1972 Laws of New York to be violative of the Establishment Clause of the First Amendment and permanently enjoins its enforcement. It is submitted that substantial issues of public importance are presented by this appeal and that this Court should exercise its jurisdiction.

Opinions Below

The opinions of the District Court, upon which the judgment appealed from was entered, are, as yet, unreported. Copies of the opinions are set forth in the Appendix, commencing at pages 1a and 40a. In addition, an earlier per curiam opinion not directly related to that part of the judgment appealed from by these appellants is set forth at page 46a.

Jurisdiction

This suit was brought pursuant to 28 U.S.C. §§ 1343(3) and 2281, 2284 to enjoin the enforcement of a statute of the State of New York as being in violation of the First Amendment. The judgment of the District Court was entered on October 20, 1972. A copy of the Order and Judgment is set forth in the Appendix, pages 48a-51a. Appellants filed their Notice of Appeal on October 27, 1972 in the District Court. A copy is set forth in the Appendix at page 52a.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The most recent cases sustaining the jurisdiction of this Court to review the judgment in this case on direct appeal are *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U.S. 602 (1971), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

Statute Involved

The statute involved is Chapter 414 of the 1972 Laws of New York, entitled "An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings." N.Y. Educ. Law §§ 408(1), 408(2), 408(3), 408(6), 549-53, 559-63, 3602(6), 3602(15) (McKinney Cum. Supp. 1972); N.Y. Tax Law §§ 612(c)(14), 612(j) (McKinney Cum. Supp. 1972). The full text of the statute [hereinafter referred to as "Chapter 414"] is set forth in the Appendix, commencing at page 55a.

Section 2 of Chapter 414, which is the only section to which this appeal and Jurisdictional Statement are applicable, requires the Commissioner of Education of New York State to make tuition reimbursement payments to parents of pupils enrolled full-time in nonpublic schools whose New York taxable income is below \$5,000 and who have paid \$20 or more in tuition to such schools in a given calendar year. These payments are to be the lesser of either (a) 50% of the tuition paid or (b) \$5 per school month for pupils in grades 1-8 or \$10 per school month in grades 9-12.

Question Presented

Is the Establishment Clause violated by Section 2, which grants partial reimbursement by the State for tuition paid by low-income parents in exercising their constitutional right to send their children to religiously-affiliated nonpublic schools which are required by New York law to provide a secular education "at least substantially equivalent" to that received in the public schools?

Statement of the Case

Immediately after Chapter 414 was signed into law in May, 1972, appellees instituted this action in the United States District Court for the Southern District of New York against Ewald B. Nyquist, Arthur Levitt and Norman Gallman in their respective capacities as Commissioner of Education, Comptroller and Commissioner of Taxation and Finance of the State of New York, praying that enforcement of Sections 1 through 5 of Chapter 414 be permanently enjoined on the ground, *inter alia*, that these sections violate the Establishment Clause.

A three-judge District Court was convened, consisting of Judge Paul R. Hays of the Court of Appeals for the Second Circuit and Judges John M. Cannella and Murray I. Gurfein of the District Court. Appellants Cherry, Ferguson and Ruiz were permitted to intervene as parties defendant on the ground that they are parents of nonpublic school children who qualify for reimbursement pursuant to Section 2 of Chapter 414.¹ Senator Earl W. Brydges was

¹ Appellants' motion to intervene was joined in by four parents of nonpublic school children who qualify for modification of their New York adjusted gross incomes pursuant to Section 5 of Chapter 414.

also permitted to intervene as a party defendant in his capacity as Majority Leader and President Pro Tem of the New York State Senate.

No discovery or trial was had. The case was briefed and argued to the Court on July 6, 1972. On October 2, 1972, Judge Gurfein filed an opinion, concurred in by Judges Cannella and Hays, that Section 2 is violative of the Establishment Clause.

Appellants appeal from so much of the judgment as declares that Section 2 of Chapter 414 violates the Establishment Clause and permanently enjoins its enforcement.³

The Questions Are Substantial

For almost two centuries, the public and nonpublic schools in New York have comprised a single system of education under the jurisdiction of the Board of Regents and the Commissioner of Education and have been governed as to secular matters by the compulsory education statute, N.Y. Educ. Law § 3204. This statute specifies that if children are educated in nonpublic schools the instruction

³ The court also unanimously held Section 1 of Chapter 414 (dealing with funds for repair and maintenance) unconstitutional. Judges Gurfein and Cannella held that Sections 3, 4 and 5 of Chapter 414 (dealing with tax adjustments for middle-income parents of nonpublic school children) are constitutional. Judge Hays filed a dissenting opinion on this point.

⁴ Defendants Nyquist, Levitt and Gallman and Senator Earl W. Brydges have separately appealed from this part of the judgment, as well as from that part of the judgment declaring Section 1 of Chapter 414 to be in violation of the Establishment Clause and permanently enjoining its enforcement. Docket Nos. 72-791 and 72-753.

Appellees have appealed from the District Court's judgment upholding the constitutionality of Sections 3, 4 and 5. Docket No. 72-694.

given must be "at least substantially equivalent" to that given in public schools, and statutes and regulations impose upon nonpublic schools detailed requirements as to attendance, curricula, accreditation, examinations and diplomas. As this Court observed in *Board of Education v. Allen*, 392 U.S. 236 (1968):

Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . . This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education. 392 U.S. at 247-48.

Approximately 20% (800,000) of all school children in New York State attend nonpublic schools.⁴ Of these 800,000 children, a substantial number come from families at or below the poverty level. While exact figures are not available, it has been reliably estimated that there are presently about 100,000 families with (some 125,000) children enrolled in Catholic schools in New York State and incomes of less than \$5,000 per year and which thus qualify for limited tuition reimbursement under Section 2.

A substantial number of these parents come from ghetto areas and minority groups. In New York City, for example, out of 65,937 pupils enrolled last year in Catholic elementary schools in the Bronx, New York and Richmond counties, 30,992 were non-white. "Today, more than sixty per-

⁴ A majority, but by no means all, of these nonpublic schools are affiliated with the Catholic Church. As of the fall of 1968, there were 327 nonpublic schools affiliated with religious bodies other than the Catholic Church and 296 with no religious affiliation. See State Educ. Dep't, *Financial Support—Nonpublic Schools—New York State* 3 (1969).

cent of [Catholic nonpublic school] elementary school students in Manhattan are Black or Spanish-speaking; thirty percent in the Bronx." *Hearings on H.R. 16141 and Other Pending Proposals Before Committee on Ways and Means*, 92nd Cong., 2d Sess., pt. 3, at 583 (Sept. 7, 1972).

Recognizing the vital need to maintain, especially for low-income parents such as these, the freedom of educational choice recognized by this Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and recently reiterated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the New York Legislature enacted Section 2 on the basis of specific findings that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated. Appendix, p. 61a.

The purpose of Section 2 is thus to provide limited assistance to parents who, because of their economic circumstances,⁵ might otherwise not be able to exercise a mean-

⁵ All of the intervenor parents who join in this appeal have incomes of less than \$5000 per year and are thus eligible for tuition reimbursement under Section 2. Appellant Cherry, who is divorced,

ingful alternative to sending their children to public schools, when, either for moral or religious reasons, or for discipline or specific secular educational respects, those parents prefer nonpublic schools.

Section 2 is not, it should be emphasized, a broad program under which the state undertakes responsibility for tuition of all children attending religiously-affiliated nonpublic schools. It is carefully limited to meeting a pressing modern problem of low-income parents (and their children) who would otherwise be denied the freedom of educational choice possessed by more affluent members of our society. It is analogous to numerous other enactments providing food stamps, medical assistance and other services oriented to the needs of families at or below the poverty level. The class of persons qualifying for reimbursement under Section 2 is limited to persons earning less than \$5,000 per year. The amount of reimbursement is also limited to the lesser of either (a) one-half of the tuition paid or (b) \$5 per school month for elementary school pupils and \$10 per school month for high school pupils. Thus, on the basis of a ten-month school year, the maximum amount of reimbursement is \$50 per year for a child in elementary school and \$100 per year for a child in high school.

has two sons who attend a nonpublic high school in Brooklyn. Their combined tuition for the school year 1971-72 was approximately \$500.00. Under Section 2, she would be entitled to a total reimbursement of \$200 for the year. Appellant Ferguson has a daughter who also attends a nonpublic high school in Brooklyn. Appellant Ferguson, a widow on pension, paid \$700.00 in tuition for the past school year. Under Section 2, she would be entitled to be reimbursed in the amount of \$100. Appellant Ruiz has two daughters who attend nonpublic high schools in Manhattan. She paid \$40.00 tuition per month for the school year 1971-72. She is now paying \$100.00 per month. Under Section 2, she would be entitled to a total reimbursement of \$20 per month.

No case previously decided by this Court has passed on such a limited system of reimbursement, and we respectfully urge that, in view of the serious condition of public and nonpublic education in the poorer sections of our cities and the obvious advantage of preserving for low-income parents a meaningful educational choice, the decision of the District Court invalidating Section 2 warrants full review by this Court. As this Court has recently stated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

... Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law. . . .

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion" . . . 403 U.S. at 612-13.*

We suggest that this case provides an opportunity for a meaningful analysis of the problem of limited tuition reimbursement in light of the criteria set forth above and that, based on such an analysis, the judgment of the District Court as to Section 2 was erroneous.

Secular Legislative Purpose

The District Court did not find that Section 2 lacked a secular legislative purpose, and, indeed, there can be no basis for any finding of a legislative intent to aid religion.

* See also *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

Rather, the District Court accepted the findings of the New York Legislature, stating that:

... we wish to make it clear that we accept these findings ... They sum up legislative purposes which are cast as secular in intent. Appendix, p. 7a.

We submit that Section 2 clearly meets this Court's "secular legislative purpose" test.

Principal or Primary Effect

Under this Court's prior decisions, a state statute is not invalid under the Establishment Clause because one effect may be the advancement of religion. As was stated in *Tilton v. Richardson*, 403 U.S. 672 (1971), the crucial question

is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether *its principal or primary effect* advances religion. 403 U.S. at 679 (emphasis added).

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The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid those institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. 403 U.S. at 679.

See also *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 672 (1970). Indeed, even in *Lemon v. Kurtzman*, this Court did not disagree with the finding of the District Court that the primary effect of the Pennsylvania statute permitting payment of salary supplements to parochial school teachers was not the advancement of religion. See 310 F. Supp. at 46.

We suggest that the principal or primary effect of Section 2 is the nurturing of a pluralistic society and the enhancement of the right of low-income parents to a meaningful choice in the education of their children.

In addition to nurturing a pluralistic society, a secondary effect of Section 2 would be to alleviate the problem of the already overcrowded and understaffed "inner-city" public schools by encouraging, through partial reimbursement of tuition payments, low-income parents of children attending nonpublic schools in those areas not to transfer their children to public schools because of an inability to pay the tuition required by nonpublic schools. Eligibility is restricted, and the amount of any reimbursement is restricted. Section 2 is thus meticulously aimed at the problem of low-income or poverty parents living in areas which would be most seriously affected by large scale shut-downs of nonpublic schools and transfers of pupils to the already hard-pressed public schools therein.

In *Lemon v. Sloan*, 340 F. Supp. 1356 (E.D. Pa. 1972), docket no. on appeal 72-459, the Court invalidated a statute providing flat tuition grants to all parents of nonpublic school parents without regard to need on the ground that its principal or primary effect was the advancement of

religion.⁷ In so doing, the court sought to draw a distinction between tuition reimbursement, on the one hand, and the furnishing by the state of services to the nonpublic school or pupil, on the other. It concluded that since tuition was essential to nonpublic schools, any reimbursement of such tuition was constitutionally impermissible. Judge Lord stated:

... By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools. 340 F. Supp. at 1364.

This reasoning completely misapplies the principal or primary effect test and ignores this Court's repeated state-

⁷ The Pennsylvania statute found unconstitutional by the District Court in *Sloan* provides for payments of \$75 and \$150 to parents of elementary and secondary nonpublic school pupils, respectively, or "the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser." [1971] Laws of Pa. No. 92, § 7, Pa. Stat. tit. 24, § 5707. In other words, it provides flat grants to all parents without correlation to their financial needs. The act entitles many parents, rich and poor alike, to payments equal to the entire amount of tuition they actually paid. Under Section 2 of Chapter 414, on the other hand, appellant Cherry, with two high school sons and a New York taxable income of less than five thousand dollars and who paid \$500.00 in tuition, is entitled only to a \$200 reimbursement. As stated above, appellant Ferguson, with a daughter in high school and a New York taxable income of less than \$1,000 and who paid \$700.00 in tuition,⁸ is entitled to only a \$100 reimbursement. Appellant Ruiz, with two daughters in high school and a New York taxable income of less than five thousand dollars and who paid \$400.00 (and now pays \$1,000) in tuition, is entitled to only a \$200 reimbursement.

ments that a statute is not unconstitutional simply because an effect is or may be to help religion. Rather, as stated by the Chief Justice in *Tilton* and as elucidated in earlier decisions such as *Allen* and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), a statute will be invalidated *only* where advancement of religion is the *principal or primary effect*. In the case of Section 2, any advancement of religion would be incidental.

In *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio), *aff'd*, 41 U.S.L.W. 3182 (Docket No. 71-1664, Oct. 10, 1972), the District Court, in striking down an Ohio parental reimbursement program, did not hold that the principal or primary effect was to advance religion.

The Ohio statute was strikingly different from Section 2 of Chapter 414. It provided flat grants to all parents of \$90.00 per nonpublic school pupil, also without any correlation to the financial situation of the parent. Before a parent could receive such a grant, he must have "spent an amount equal to or in excess of the per-child grant for the purpose of providing educational opportunities to his child equivalent to those available to children in the public schools . . ." Thus, a person who spent \$90.00 would have gotten back 100 percent, \$100.00 90 percent, and so on. Just as is true with the Pennsylvania statute, but unlike Section 2 of Chapter 414, the Ohio act contained no mechanism for limiting the aid to one half or less of the tuition actually paid by parents who have a grave financial need. Presumably, the entire tuition fee for some children could be subject to state reimbursement under the Ohio statute. This Court's action in affirming the District Court's judgment in *Wolman* should therefore not preclude full review of Section 2 of

Chapter 414, which is explicitly limited as to qualified parents and as to amounts reimbursed.

There are innumerable laws, both federal and state, which result in far greater direct benefits to church-related educational institutions than the conceptual benefit conferred by Section 2. For example, the Veterans Readjustment Benefits Act of 1966⁹ ("G.I. Bill of Rights") and National Defense Education Act of 1958¹⁰ provide tuition payments (and in the case of the G.I. Bill, textbooks) for student veterans attending schools and colleges of their choice, whether public or private, secular or religious. The War Orphans' and Widows' Educational Assistance Act¹¹ provides for subsistence, tuition, etc. for widows and children of persons in the armed forces who die of service connected disabilities, regardless of whether the tuition is at public or private educational institutions. The New York State Regents Scholarship Program¹² provides 19,500 scholarships annually to apply toward tuition at any public or nonpublic post-secondary school, regardless of religious affiliation, with the amount of the scholarship varying depending on the income of the student's family. The New York State Scholar Incentive Program¹³ authorizes grants to students attending any public or nonpublic post-secondary school, regardless of religious affiliation, provided the student meets specified academic standards, with the amount of the grant varying, depending on the income of

⁹ 38 U.S.C. ch. 33.

¹⁰ 20 U.S.C. ch. 17.

¹¹ 38 U.S.C. § 1700 *et seq.*

¹² N. Y. Educ. Law § 601.

¹³ N. Y. Educ. Law § 601-a.

the student's family. The Elementary and Secondary Education Act of 1965¹³ provides funds to local educational agencies to meet the special educational needs of children from low-income families; authorizes grants for acquisition of school library resources, textbooks and other instructional materials for the use of children and teachers in both public and private elementary and secondary schools; and authorizes grants for supplementary educational centers and services. The Legislative Reorganization Act of 1946¹⁴ provides that pages in the Senate, House of Representatives and this Court may be educated either in the public schools of the District of Columbia or in "a private or parochial school of their own choice," the cost thereof to be borne by the United States Treasury.

The purpose of these various statutes was certainly not to advance religion. Rather, it was to meet the special needs of certain groups, such as veterans, war orphans, low-income families, and even pages in Congress and this Court, for financial assistance in obtaining an education. In view of this, we suggest that the action of the District Court in invalidating Section 2 deserves a full review by this Court.

Excessive Entanglement or Involvement

The third part of the test summarized in *Lemon v. Kurtzman* and *Tilton* is whether a statute fosters "excessive government entanglement with religion".

This Court has recognized: "No perfect or absolute separation [between religion and government] is really possible;

¹³ 79 Stat. 27.

¹⁴ 2 U.S.C. § 88a.

the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.” *Walz v. Tax Commission of the City of New York*, 397 U.S. at 670. “In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.” *Lemon v. Kurtzman*, 403 U.S. at 615. But, “[n]o one of these three factors standing alone is necessarily controlling,” *Tilton v. Richardson*, 403 U.S. at 688 (Burger, C.J.); it is their combination which is decisive.

In *Walz*, this Court found that tax exemptions for church-owned properties resulted in “. . . only a minimal and remote involvement . . . far less than taxation.” 397 U.S. at 676. In *Tilton*, this Court found that a federal statute providing construction grants for secular-purpose buildings at religiously-affiliated colleges and universities did not foster excessive entanglement with religion for several reasons, including the absence of any need for “. . . intensive government surveillance.” 403 U.S. at 687.

On the other hand, the Rhode Island and Pennsylvania statutes providing for state payment of the salaries of teachers of secular courses in nonpublic schools were invalidated because of the need for extensive probing by the state into the internal affairs of the schools to ensure that the state funds were being used only for secular teaching. This Court stated in *Lemon v. Kurtzman* with respect to the Rhode Island statute:

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church. 403 U.S. at 619.

And with respect to the Pennsylvania statute:

... In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state. 403 U.S. at 621-22.

Tested by these criteria, any government involvement in or entanglement with religion is nonexistent or inconsequential in the case of Section 2. A low-income parent simply fills out a form which provides standard information concerning himself and his child and sets forth the number of months of attendance and the amount of tuition paid. This information is then certified by the school authorities and forwarded to the State Education Department. Since the only relevant facts are the parent's income, the amount of tuition paid and the fact and periods of attendance by the child, there can be no occasion for any surveillance by the state of the nonpublic school's activities beyond that which has always been conducted to ensure compliance by such schools with the academic and other requirements imposed on all schools, public and nonpublic alike, by the New York Education Law.

The District Court in its opinion raised extreme hypothetical questions irrelevant to this case:

... If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca. Appendix, p. 28a.

This case does not involve such hypothetical eventualities, but rather deals with the hard fact that poor parents wishing a nonpublic school education for their children are deprived of a free and fair choice. Moreover, Section 2 does not relieve those poor parents of the economic burdens associated with nonpublic school education, but simply alleviates those burdens to the very minor and limited extent of either half of the tuition paid or \$5 or \$10 per month per child, whichever is less. This is only a fraction of the total cost of even the secular aspect of their tuition.

Conclusion

It is submitted that the District Court erred in deciding that Section 2 violates the Establishment Clause, that the questions presented by this appeal are substantial and of extraordinary public importance, and that this Court should note probable jurisdiction.

December 21, 1972

Respectfully submitted,

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APPENDIX

Opinion of Gurfein and Cannella, JJ.

Dated October 2, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ABYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, As Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of
New York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M.
DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA,
ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Before

**HAYS, Circuit Judge, CANNELLA, District Judge
and GURFEIN, District Judge.**

Opinion of Gurfein and Cannella, JJ.

GURFEIN, D.J.

We are again confronted with the question of the constitutionality of an Act of the New York Legislature relating to nonpublic schools, the children who attend them, and their parents. The plaintiffs are an unincorporated association and individuals who are residents of the State of New York and who pay income taxes and other taxes to that State. Some of the plaintiffs have children attending public schools. The defendants are the Commissioner of Education, the Comptroller and the Commissioner of Taxation and Finance of the State of New York.¹

Jurisdiction is alleged under United States Code, Title 28, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202. The amount in controversy, exclusive of interest and costs, is alleged to be in excess of \$10,000.

By consent of all parties, a motion to convene a three-judge court pursuant to Title 28, Sections 2281 and 2283, was granted, and this Court was convened.

The plaintiffs seek to enjoin the defendants from approving or paying any funds or according tax benefits as provided in the Act to be described. The State seeks a dismissal of the complaint on the merits but asserts no jurisdictional bar to maintenance of the action.

Since no trial has been had, the attack upon the several parts of the Act assumes that they are each facially unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution. The Act (N. Y. Laws of 1972, c. 414) is divided into five parts,

¹ Parents of children enrolled in nonpublic schools have been permitted to intervene as parties defendant. Similar permission was granted to Hon. Earl W. Brydges, Majority Leader and President *pro tempore* of the New York State Senate.

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three of which are attacked by the plaintiffs as being in violation of the establishment clause which guarantees the separation of Church and State, as applied to the states by the Fourteenth Amendment.² These three parts of the statute which are under attack may be summarized as follows:

A. Section 1 provides for grants of money directly from the State Treasury to nonpublic schools for "maintenance" of the buildings if the nonpublic school has been designated during a base year as "serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C.A. §425)."³ If the school qualifies under the federal standard, it is to be given a direct grant of \$30 per pupil in attendance, which is increased to \$40 per pupil to those schools which are more than twenty-five years old.⁴ The grants, which are given directly to the particular nonpublic schools eligible for such grants, are to be in reimbursement of "maintenance and repair" costs incurred in the preceding year. "Maintenance and repair" is defined as "the provision of heat, light, water, ventilation and sanitary facili-

² The sections of the Act not under attack provide for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and provide for the purchase of nonpublic school buildings by public school districts where the nonpublic school has been closed (Sections 6-10).

³ 20 U.S.C. §425 deals with the partial forgiveness by the Federal Government of certain educational loans to students who become teachers in "a school in which there is a high concentration of students from low-income families," and provides a method for determining that criterion.

⁴ The amount of the grants is limited to "fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner."

Opinion of Gurfein and Cannella, JJ.

ties, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner [the State Commissioner of Education] may deem necessary to ensure the health, welfare and safety of enrolled pupils." Each qualifying school which seeks an apportionment is required to submit to the Commissioner an application which shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

This part of the Act is entitled "Health and Safety Grants for Nonpublic School Children" and is prefaced by certain legislative findings. These recite that: (1) it is the primary responsibility of the state to ensure the health, welfare and safety of children attending both public and nonpublic schools; (2) "[f]inancial resources necessary to properly maintain and repair [deteriorating] buildings are beyond the capabilities of low-income people whose children attend nonpublic schools;" (3) teachers are given incentives by the Federal Government to teach in these poor areas; (4) healthy and safe nonpublic schools contribute to the stability of urban neighborhoods; and finally (5) "[t]o insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."⁵

⁵ Because of the suggestion that it was essential for the State to know promptly whether it could disburse the funds as provided in Section 1, we announced in a *per curiam* opinion our holding that this Section was in violation of the First Amendment as applied to the states by the Fourteenth Amendment. This opinion elaborates that decision.

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B. Section 2 of the Act provides for flat tuition grants from the State Treasury to parents with family incomes of less than \$5,000 per annum who have children attending elementary or secondary nonpublic schools. The grant is in the sum of \$50 a year for children in grades 1 through 8, and \$100 in grades 9 through 12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent. The Commissioner is given "responsibility for the administration of the program" and is given authority to "promulgate such regulations as are necessary to carry out the provisions of this article." This section is entitled "Elementary and Secondary Education Opportunity Program."

Section 2 is prefaced by legislative findings that (1) "[t]he vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children"; (2) the Supreme Court of the United States has recognized this "right" of selection, but the "right" is diminished or denied to children of poor families whose parents have the least options in determining where their children are to be educated; (3) any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs which would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education; and (4) it is a legitimate purpose for the State to partially relieve the financial burdens of parents who provide a nonpublic education for their children.

C. Sections 3, 4 and 5 provide that an individual shall be entitled to subtract, for State income tax purposes, from

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his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent.* This exclusion may be taken only by parents with adjusted gross incomes of from \$5,000 to \$25,000 who do not receive a tuition assistance payment under Section 2. The exclusion would be as much as \$1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers apparently

* The table is as follows:

<i>If New York adjusted gross income is:</i>	<i>The amount allowable for each dependent is:</i>
Less than \$9,000	\$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	-0-

Estimated Net Benefit to Family

<i>One Child</i>	<i>Two Children</i>	<i>Three or more</i>
\$50.00	\$100.00	\$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

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as shown in note 6, *supra*. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

This part of the Act is prefaced by legislative findings (§3) that (1) statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions; (2) nonpublic educational institutions are entitled to a tax exempt status by virtue of legislation which has been sustained by the courts; (3) by their existence, such educational institutions relieve the taxpayers of the State of the burden of providing public school education for the children who attend nonpublic schools; (4) tax laws also authorize deductions for education related to employment; and (5) similar modifications of Federal adjusted gross income should also be provided to parents for tuition paid to nonpublic schools.

We have stated the legislative findings offered in support of each part of the statute in detail because we wish to make it clear that we accept these findings, except where they purport to state principles of applicable constitutional law. They sum up legislative purposes which are cast as secular in intent. Thus, we must start with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption that the Legislature intended to provide a quality education for all children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption

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that the Legislature intended to provide a quality education for all children and to nurture a pluralistic society by giving money from the State Treasury to poor parents for tuition in nonpublic schools. And lastly we must assume that taxpayers as a body have, indeed, been relieved up to now of the burden of providing public school education for the children who attend nonpublic schools.

In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support. If that is constitutionally permissible, it is a worthy objective and one that should not be lightly set aside in the alleged interest of public education. Both public and nonpublic education can exist side by side. Neutrality forbids discrimination in favor of one system over the other.

Whether the main reason for this *legislative* concern is the fear that an intolerable financial burden will be cast upon the public schools if the nonpublic schools do go under, or whether the main reason is the survival of religious education, is not the particular *judicial* concern. We must weigh not only the purpose of the legislation but its effect on the traditional separation of Church and State in this country. As to the former, we accept the legislative statements. As to effect, we must exercise the judicial function of interpreting what effect the legislation will have upon areas protected from invasion by the constitutional guaranty.

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This is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their rights to the free exercise of religion. The other group, equally dedicated, believes that encroachment of Government in aid of religion is as dangerous to the secular state as encroachment of Government to restrict religion would be to its free exercise. Since the policy of separating Church from State is not merely one of policy but of constitutional provision, the ultimate determination of such conflicts must rest in the judicial branch. And the judges must be especially careful in this delicate area not to allow their personal predilections on policy to circumscribe their judgment as to the constitutional effect of particular legislative proposals. We must make a constitutional decision between these two worthy objectives. Yet, as an inferior federal court, we are not permitted to view the religion clauses of the First Amendment in a literal or even in an historical fashion. We have only to determine their meaning as authoritatively expounded by the Supreme Court. We shall, therefore, discuss the constitutionality of each of the three parts of the statute under the guidelines laid down by the Supreme Court, as we understand them.

I

The findings of the Legislature in respect of the needs of parochial schools in low income areas must, as we have said, be accepted as fact. For us to delve into the reasons why parochial education is stratified by the boundaries of richer or poorer districts would be improper, for that would be

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trenching on the prerogatives of religious denominations which must determine their own priorities and administration without State interference under the Free Exercise Clause of the First Amendment, as well as under the negative implications of the Establishment Clause. It is not to be gainsaid that slum-area parochial schools do have financial troubles. The issue is whether it is constitutional for the State to maintain them. Of the estimated 280 schools in the low income areas, which the Legislature seeks to help, all or practically all, it was conceded upon the argument, are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree. It is at this point that we must pause to review the history of the Establishment Clause in the courts in the light of the respective contentions of the parties.

The First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)), provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

In *Everson v. Board of Education*, 330 U.S. 1, the Supreme Court was for the first time required to determine what was "an establishment of religion" in the First Amendment's conception (see *id.* at 29). It was there recognized by all the Justices that not simply an established church, but any law respecting an establishment of religion is forbidden and that schools teaching religion come within the scope of the clause prohibiting the "establishment of religion."⁷ The precise issue in that case, upon which the

⁷ *Id.* at 15 (Black, J.), see *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).

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Court divided five to four, was the constitutionality of a New Jersey statute which allowed reimbursement of parents for the bus fares of children attending parochial schools as well as public schools; the particular provision was held constitutional. In view of the broad meaning attributed to the Establishment Clause by all the Justices, it is instructive to consider the limitations set upon their own decision by a majority of the Court. In the words of Mr. Justice Black for the majority, the "establishment of religion" clause "means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 15-16. Nor is the prohibition only against a tax *levy* to support religious teaching. It is also against *using* tax-raised funds for that purpose. Mr. Justice Black wrote: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment *contribute* tax-raised funds to the support of an institution which teaches the tenets and faith of any church" (emphasis added).

The majority of the Supreme Court did conclude, nevertheless, that the reimbursement of bus fares to parents was public welfare legislation, and that New Jersey could not be prohibited from extending its general state law benefits to all its citizens without regard to their religious beliefs. But the Court was careful to note in support of its decision that "[t]he State contributes no money to the schools. It does not support them." 330 U.S. at 18.

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The general language, however, did not remove the delicacy or the difficulty of the issues raised in succeeding cases. For we are a nation which recognizes value in religion but seeks to maintain neutrality in that sphere. Neutrality is not merely a state of mind, however. Neutrality inevitably means a relationship to religion, one way or another. And thus the Court formulated a two-fold test for sustaining legislation alleged to violate the Establishment Clause: There must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *School District v. Schempp*, 374 U.S. 203, 222 (1963). The Court recognized that this test "is not easy to apply," but that a law which "merely makes available to all children the benefits of a general [New York State] program to lend school books free of charge" is not in violation of the Establishment Clause. *Board of Education v. Allen*, 392 U.S. 236, 243 (1968). This decision brought forth three dissents, as well as a concurrence by Mr. Justice Harlan on the limited ground that the statute there involved "does not employ religion as its standard for action or inaction" *Id.* at 250.

The bifurcated test of intent and effect was again accepted in *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), a case to which we shall advert later. Furthermore, to the two tests was added a third, that the statute must not involve an "excessive entanglement" with religion. *Id.*

Yet, the issue of direct financial grant to parochial schools had not yet confronted the Court. Last year, such an issue was finally presented in the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This case is not only the most recent, but the most closely in point to the question of direct grants to primary and secondary parochial schools under Section 1

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of the statute before us, as is *Tilton v. Richardson*, 403 U.S. 672, decided the same day.

The *Lemon* case involved legislative grants as supplements to teachers' salaries in parochial schools in Pennsylvania and Rhode Island. The Rhode Island statute contained a legislative finding that the quality of education available in nonpublic elementary schools was jeopardized by the rising salaries needed to attract teachers, and authorized state officials to supplement the salaries of teachers of secular subjects in those schools by direct limited payment to the teacher, who was to teach only subjects taught in the public schools and no courses in religion. The Pennsylvania statute contained a legislative finding of rapidly rising costs in the State's nonpublic schools, and authorized reimbursement by the State to nonpublic schools of actual expenses for teachers' salaries, text books and instructional materials only in teaching secular subjects, and expressly excluded religious teaching.

Each statute, it will be seen, makes a distinction between that function of the parochial school which teaches secular subjects and that function which teaches religion, and stresses that state aid is not to be given for religious teaching. However, both the Pennsylvania and the Rhode Island statutes were struck down by the Supreme Court as violative of the Establishment Clause.

The opinion by the Chief Justice chose to hold the state legislation in violation of the Establishment Clause on the third of the three tests—excessive entanglement. This excessive entanglement was found to be of two kinds—administrative and political. The latter was based upon the prediction that continuing financial pressures on the

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nonpublic schools would, because of the annual nature of appropriations, generate considerable and recurring political activity to increase state aid, and that such activity would be along religious lines.

This choice of tests avoided the necessity to decide whether in *all* cases direct aid would be unconstitutional. But there is no indication, in our view, that the primary effect test, as a separate test, has been abandoned. And so far as precedent is concerned, the only direct aid to church-related institutions thus far sustained by the Supreme Court has been aid to hospitals, *Bradfield v. Roberts*, 175 U.S. 291 (1899) and the colleges in *Tilton*, where religious indoctrination was not a substantial purpose or activity of the church-related institutions. Nor was there any overruling in *Lemon* of various statements of the Justices that direct subsidy which aids schools with a religious mission would be unconstitutional. The striking down in *Tilton* of the provision inferentially permitting use of the buildings after twenty years for religious purposes, on the contrary, appears to bring such a subsidy within the primary effect test, without regard to the excessive entanglement test. *Tilton* is discussed more fully below.

While the opinions of the Justices who wrote separately supporting the result in *Lemon* differ in reasoning, the quintessence of what was held may, perhaps, be gleaned from the sole dissenting opinion, that of Mr. Justice White. 403 U.S. at 662. He stated the issue in the following terms: "Both the United States and the States urge that if parents choose to have their children receive instruction in the required secular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or

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all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school. The issue is fairly joined." Mr. Justice White relied strongly on the Free Exercise Clause to support his dissent, a view also urged upon us. But the rest of the Court refused to consider the conceded constitutional right of a parent to send his child to a parochial school as sufficient to sustain the public subsidy by the States in the face of the Establishment Clause. And Mr. Justice White himself made it clear that his dissent in the Rhode Island case was based upon findings of the District Court, which he maintained were ignored by the majority; and in the Pennsylvania case, he dissented only from the holding that the statute was *facially* unconstitutional.

It is important, because of the varied reasoning of the majority, to note what Mr. Justice White, as well, considered to be unconstitutional, and then to compare that formulation with the issue before us. Mr. Justice White explained:

"As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in

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the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional." 403 U.S. 671 n.2.

In the case at bar, we are dealing largely with the same parochial school system that was before this Court in *Committee for Public Education and Religious Liberty v. Levitt and Nyquist*, 342 F. Supp. 439 (S.D.N.Y. April 27, 1972). The answers to interrogatories made there established that New York State construed as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7) There seems to be no dispute that the statute here is also intended to apply to such schools.*

* The plurality opinion in *Tilton, infra*, by the Chief Justice makes it clear that the plurality were convinced that, with respect to the four colleges there involved, "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities." 403 U.S. at 687. On the other hand, aid to primary and secondary parochial schools is supported in New York on the very ground that parents have the right to choose parochial school education for their children as an important incident to their free exercise of religion, which includes the right to provide for religious indoctrination of the children through the parochial school.

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In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court held, five to four, that payments could be made under the Higher Education Facilities Act of 1963 to certain church-related colleges under one-time Federal construction grants for college facilities excluding "any facility used or to be used for sectarian instruction or as a place for religious worship or . . . primarily in connection with any part of the program of a school or department of divinity" (emphasis added). The Act permitted the Government to recover the funds granted within twenty years, if the restrictions on use of the building for religious teaching were not met. While sustaining the payments, the Court held unanimously that limiting the right of the Government to recapture the payment if the building should be used for religious purposes *after* twenty years was unconstitutional. It was accepted that the use of public funds for the construction of a building to be used for the teaching of religion was facially unconstitutional. Again, Mr. Justice White, while suggesting that the Court in *Tilton* was ruling that payments made directly to a religious institution are, without more, not forbidden by the First Amendment, 403 U.S. at 664, nevertheless concurred in the Court's invalidation of the provision whereby the restriction on the use for religious purposes of buildings constructed with Federal funds terminates after twenty years, 403 U.S. 665 n.1. The line drawn, it seems to us, is that while an entirely separate building of a church-related college, in no way related to the teaching of religion or the housing of worship, may receive public funds, it may not receive such funds from the moment when secular and religious teaching or prayer are mixed in the same building.

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Moreover, a direct grant to the parochial school is not the same as an across-the-board payment to parents of parochial school children which advances the common good as distinguished from religious good, and which equalizes the burden of the nonpublic school parent. The majority by Mr. Justice White in *Allen*, *supra*, pointed out the distinction: "Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S. at 243-44. Mr. Chief Justice Burger, in *Lemon*, noted that "the Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church related schools." 403 U.S. at 621. He distinguished *Everson* and *Allen* on the very ground that there state aid was provided to the student and his parents—not to the church related school. And he noted that in *Walz* the Court had warned of the dangers of direct payments to religious organizations. *Id.*⁹

In Mr. Justice Brennan's view, "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz v. Tax Commission*, *supra*, 397 U.S. at 690.

⁹ The impact of *Lemon* and *Tilton* on direct cash payments is suggested by two memorandum decisions filed on the same day. The Court vacated and remanded, for consideration in the light of *Lemon* and *Tilton*, *Kervick v. Clayton* and *Hunt v. McNair*, 403 U.S. 945 (1971). *Kervick* had upheld construction loans under the New Jersey Educational Facilities Authority Law, 56 N.J. 523, 267 A. 2d 503 (1970). *Hunt* had upheld the issuance of bonds to pay off the indebtedness of a Baptist College under the Educational Facilities Authority Act, 255 S.C. 71, 177 S.E. 2d 362 (1970).

The Supreme Court of New Jersey, after the remand, held valid the statute which creates an Educational Facilities Authority to sell bonds and lend the proceeds to educational institutions, without

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This view is supported by history. The New York State Constitution provides in Article XI, §3:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

Fewer than a half-dozen states omit such a provision. See 403 U.S. 647 & n.6. While the ultimate decision in the *Tilton* case prohibited a grant for construction of a building used for religious teaching (even after twenty years), the Constitution of New York itself prohibits the granting of such funds for "maintenance," the very objective of Section 1 of the statute we are considering. While it is not our purpose to determine constitutionality under the New York Constitution—a matter reserved for the State courts

pledging the credit of the State. *Clayton v. Kervick*, 59 N.J. 583, 285 A. 2d 11 (1971). But it concluded that even with respect to loans, as distinguished from grants, a facility may not be used for sectarian instruction or as a place of religious worship even after repayment of the loans; and no college may participate if it restricts entry on racial or religious grounds or requires all students gaining admission to receive instruction in the tenets of a particular faith. *Id.* at 20-21.

The Supreme Court of South Carolina also upheld its loan statute which provided that the facilities involved shall not be used for sectarian instruction. *Hunt v. McNair*, 187 S.E. 2d 645, 652 (1972).

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—we cannot avoid being impressed, in our consideration of the guidelines of the Supreme Court, by the almost unanimous views of the states as expressed in their respective constitutions adopted by the people.

The argument is made, however, that since janitorial functions and snow removal obviously are not the teaching of religion, their neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury. The argument is bottomed on the assumption that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction. Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion. If it be argued that the subsidy would go only to the needy parochial school which has no surplus to apportion, the short answer is, of course, that such a parochial school would have more than it has now, for it does now pay from its present budget for janitor services and heat.¹⁰

¹⁰ The State urges upon us for consideration some language of Chief Justice Burger in *Tilton, supra*, to the effect that "[c]onstruction grants surely aid these institutions [the church-related colleges] in the sense that the construction of buildings will assist them to perform their various functions." 403 U.S. at 679. The State notes that this form of governmental assistance was upheld.

Taking it in its literal sense the argument from the language is a fair one. But the quoted language must be read in the light of the Chief Justice's actual holding that use of the buildings for religious purposes, even after twenty years, was unconstitutional.

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The vice, moreover, is not only that the school budget as such is indivisible, but that no effort is made in this part of the statute to distinguish between secular and religious education. The janitorial service embraces cleaning the chapel, where there is one, and heat is provided to the classrooms where religion is taught. There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom. Cf. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).¹¹

Nor is the aid provided, though neutral in the sense of direct religious activity, given to any but a small class of institutions, almost all Roman Catholic, in deprived areas. It provides direct support for the maintenance of schools which teach religion.

Moreover, as Chief Justice Burger said in *Walz, supra*, "Obviously a direct money subsidy would be a relationship pregnant with involvement," 397 U.S. at 675. The "involvement" includes the inevitable auditing of reports of expenditures for maintenance and repair which surely must include the right of the State to determine the fairness of the charges made. The determination must be made

¹¹ The Supreme Court of Wisconsin recently held to be in violation of the Establishment Clause of the First Amendment a statute which authorized the contracting for purchase of dental education by the University [Marquette] dental school because it permitted the use of funds paid under the contract "in support of the operating costs" of the university without limiting the use of such funds exclusively to the providing of dental education in the dental school of the university. *State ex rel. Warren v. Nusbaum* (State No. 266, July 7, 1972). This result was reached even though the Court recognized that the very nature of dental education assures the completely secular nature of the teaching of dentistry.

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whether the expenditures were, in fact, commensurate with the amount of the grant under the formula.

And the very percentage formula (\$30 or \$40 per pupil out of the entire tuition), honestly intended to avoid use of the subsidy for religious purposes, inevitably requires an assessment of how much of the education supplied is secular and how much religious. It is argued that the Legislature was careful to allow only fifty per cent of the actual costs of "maintenance and repair," as a maximum, and that this is assurance that the maintenance grant is not for religious teaching. But the very argument invites considerations of the percentage relationship of secular to religious teaching and the relative impact of religious indoctrination. The *Tilton* approach is not possible where the school to be benefited is not merely church-related but is itself part of the religious mission. If the Legislature is to be asked to determine formulas based on religious teaching *vel non*, it invites the very excessive entanglement we were instructed to avoid in the *Lemon* case.

If public subsidy for janitorial service and heat to needy nonpublic schools is allowed, we may ask whether the next step will not be to supply desks and blackboards and ultimately part of a building on a percentage basis, on the ground that these are not religious in character. Would it not then be argued that where a building is in serious disrepair it is better not to patch it up but to build a new building with public funds on the ground that such would be a health and welfare grant?

Nor is the argument based on the police power of the State convincing. Education is as much an important function within the police power of a State as are health and

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safety. See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The conflict of the First Amendment with the police power has been made apparent in the constitutional decisions affecting educational activity by the states. Almost any legitimate activity, except the teaching or preaching of religion itself, can be said to be within some element of police power of the State. Yet, a State law enacted in the exercise of otherwise undoubted State power may not prevail against Federal law. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). State power, as we have been instructed, cannot, in this area, leap the constitutional barrier when it uses direct, special subsidy as the means to implement such power.

The political pressures on the Legislature are bound to be strong along religious lines. As the Chief Justice said in *Lemon*: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." 403 U.S. at 623.¹²

To summarize our reluctant conclusion that we cannot sustain a direct public subsidy for the "maintenance and repair" of religious schools under the guidelines of the

¹² The brief of Senator Brydges argues that "[i]t is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its [sic] debates" (p. 37). We think that the Supreme Court, in its emphasis on "excessive entanglement" did not intend to limit legislative debate, but rather to strike down legislation which would encourage future divisive debate on religious lines. Whether this constitutional test should be modified is not within the province of this District Court. The argument can be made only to the Supreme Court.

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Supreme Court, our points of departure with the argument of the State of New York are that: (1) "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach* or practice religion." *Everson, supra*, 330 U.S. at 16 (emphasis added). We think *Tilton* does not overrule the application of the dictum to the case at bar. (2) The statute involved, though concentrating on schools in deprived areas, makes no distinction between secular and religious teaching, and tax-raised funds are directly used for the maintenance of buildings which teach religion. (3) We cannot accept the view that, under present doctrine, budgets for churches, synagogues or parochial schools can be made divisible by ascribing a percentage of cost to neutral functions. (4) On the contrary, we interpret the dictum of the Supreme Court that neutral services may be afforded to parochial schools to mean simply that general services, such as transportation, secular books, free lunches and, perhaps, athletic training, visiting nurses and the like, afforded to students in *all* schools may also be made available to students in parochial schools. (5) We think that, unlike the one-time construction of new buildings as in *Tilton*, the "maintenance and repair" provisions of the New York statute involve "continuing financial" and political "relationships [and] dependencies." *Tilton, supra*, 403 U.S. at 688.¹³

In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within

¹³ It must be noted that the colleges involved in *Tilton* were not directly controlled by the church; the elementary and secondary schools covered by the New York statute are controlled by a religious hierarchy.

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the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both.

II

Section 2 of the statute provides for partial reimbursement to needy parents for the tuition they pay to send their children to parochial schools. Although the payment is to the parent, by hypothesis he is within a low annual income bracket (below \$5,000) which would make it possible that he could not afford to send his children to parochial school in the absence of a direct subsidy from the State Treasury. Indeed, it is the very assumption of the Legislature in its findings that he will use the money grant for tuition. Whether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance. The recipient is the parochial school. The source is the State tax-derived money. The parent is simply a conduit. See *Griffin v. County School Board*, 377 U.S. 218 (1964); *Griffin v. State Board of Education*, 239 F. Supp. 560, 563 (E.D. Va. 1965), *overruled on other grounds*, 296 F. Supp. 1178 (E.D. Va. 1969); *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio 1972).

While in the general distribution of a State aid program, as in the case of reimbursement of bus transportation to parents (*Everson, supra*), the loan of text books to students (*Allen, supra*), free lunches to children and the like, there is a distinction between a grant to the family and a grant to the parochial school, there is no such distinction

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where the parent is a mere conduit for a payment of tuition. In the former, the costs assumed by the State were generally borne by the parents, in the first instance, and it is they who are being reimbursed, not the school. In the case of tuition, it is the school which benefits by getting tuitions from State funds which it might otherwise not receive.¹⁴

The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their "right" to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

¹⁴ Senator Brydges' brief argues as "history" (p. 16) that with respect to Section 3209 of the N.Y. Education Law, the New York Attorney General in 1935 ruled that it applied to children attending parochial schools as well as public schools. We agree that the affirmative duty of "public welfare officials" to furnish "indigent children with suitable clothing, shoes, books, food and other necessities to enable them to attend upon instruction as hereinbefore required by law" does not require the denial of these benefits to needy children who attend parochial schools. But there is nothing in that statute concerning the payment by the state of tuition for needy children. The Education Law involved a general grant to all which did not include tuition.

As to tuition, there may be situations where special circumstances make attendance at public schools impractical as in the case of orphan schools, see *Sargent v. Board of Education*, 177 N.Y. 317 (1904); Indian schools, Education Law, art. 83; and schools for deaf and blind children, *id.* art. 85. But those sections are not relevant to normal children who can attend the public schools.

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These are serious arguments that cannot be disregarded, particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society.

The propagation of religious doctrine was early made the responsibility of the particular denomination in hard times as well as good times. We know, however, that inflation was no concern of the framers of the First Amendment, and, as individuals, we sympathize with its victims. But a State-supported church school is simply not a part of our way of life, and the payment of tuition for its pupils makes the church school a State-supported school.¹³

¹³ In the language of Chief Judge Lord in *Lemon v. Sloan*, 340 F.Supp. 1356, 1364 (E.D. Pa. 1972): "The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid those schools."

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While there can be no proof either way, it is possible that among persons eligible for the tuition grant there will be not only those who now have their children in a parochial school but also some whose children now attend the public schools and whom they would transfer to a parochial school.

The implications of recognizing a "right" to the support of public funds for the expression of the free exercise of religion are, moreover, staggering. Religious belief and the right to practice religion, including the teaching of the young, are precious rights to be preserved unto death itself. But a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment. If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca. These are all "rights" to the free exercise of religion that cannot be denied, and from the exercise of which the poor may be excluded by circumstance.

If the Founding Fathers had any intentions about religion, it was surely to separate the concern of the Government from the concern of the individual religious community. That is why we have the double-edged religion clauses of the First Amendment—no law respecting the establishment of religion *or* the free exercise thereof. Each sector must not only respect its own proper functions. Each must also support them. This appears to be the essence of the voluntarism requirement of the First Amend-

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ment; see Harlan, J., concurring in *Walz, supra*, 397 U.S. at 696.

The examples cited by the State to support its argument for tuition reimbursement to poor parents deal with the striking down of exactions by the State of money from the poor as a condition to their exercise of particular constitutional rights, like the right to sue in the courts for divorce without paying court costs, *Boddie v. Connecticut*, 401 U.S. 371 (1971), and the right to vote without paying a poll tax, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). So, too, *Sherbert v. Verner*, 374 U.S. 398 (1963) held invalid the denial of unemployment benefits where the free exercise of religion was inhibited. The statute here, on the contrary, affirmatively establishes benefits for the free exercise of religion. No case has been cited where an affirmative cash subsidy to advance the constitutional right to the free exercise of religion was allowed.

Nor do we ignore the argument forcefully put by the State and by representatives of the able majority leader of the State Senate. The possible closing of Catholic parochial schools on a large scale would cast a heavy burden on an already overburdened State. But we must recognize, within the guidelines set by the Supreme Court, that economic hardship alone is not enough to overcome the strictures of the First Amendment. The Court in *Lemon, supra*, accepted the legislative findings of economic stringency in the parochial schools, with the obvious, if not fully articulated, potential effect on the State finances of Rhode Island and Pennsylvania. It, nevertheless, struck down what were clearly economic measures to help the fiscal condition of

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the nonpublic schools with the possible consequence of forced absorption of their burdens by the States.

The argument, like many good arguments, stretches the band to the breaking point. For it must be tested for validity against contingencies which could occur and which would have a strong effect on legislative action, not only because of religious pressures on the legislators, but because of the conviction that the public treasury has more to gain by supporting church schools directly than by not supporting them.

If conditions worsen, it would be proper, under this argument, to pay the salaries of the secular teachers. But that is what has just been invalidated by the Supreme Court. The argument would logically admit of circumstances, honestly based upon economic need, which would support the grant of public funds, at least for secular education, in geographic areas where there were not enough parochial schools, and where the pressure of population would otherwise cause great hardship to the neighborhood public schools. Once we embark upon such a course, we fear that the meaning of the Establishment Clause will be diluted to the point where the State will support the parochial schools with the inevitable control by the State built into an anomalous situation. That is a condition devoutly not to be wished. The proponents of this legislation will probably affirm that they are willing to take their chances on such an eventuality and that they would rather have the funds in hand. But it is the peculiar function of the judicial branch to remain unmoved by current desires, not in the sense of usurping the province of legislatures, but

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in viewing basic constitutional provisions as outliving the generation of men which has to interpret them."¹⁸

III

The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools in the State. Second, it does not involve a subsidy or grant of money from the State Treasury as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because

¹⁸ (a) A similar conclusion was recently reached by a three-judge court in the Eastern District of Ohio. *Wolman v. Essex*, 342 F.Supp. 399 (E.D. Ohio 1972). There moneys had been appropriated for "educational grants to parents" and for the provision of neutral, non-religious "materials and services" for pupils attending nonpublic schools. The statute was held to be in violation of the Establishment Clause of the First Amendment.

(b) A Pennsylvania Act providing for reimbursement of tuition payments to parents whose children attend nonpublic schools was declared unconstitutional in spite of a legislative declaration that parents who send their children to nonpublic schools assist the State in reducing the rising cost of public education, and that if children now attending nonpublic schools were forced to transfer to public schools "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state." *Lemon v. Sloan*, *supra* at 1366 (three-judge court). Chief Judge Lord wrote: "If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so." *Id.* at 1365.

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of religious belief or otherwise, send their children to non-public full-time schools, as is their constitutional right. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the on-going political activity as likely, in our opinion, to cause division on strictly religious lines.

We shall explain our reasons briefly.

There has always been a sharp distinction in the history of the United States between direct grants of public funds to religious institutions, generally prohibited, and tax exemption for religious institutions, generally permitted. This indirect aid to religious institutions has largely taken two forms, exemption from local property taxes and the like, and income tax exemptions for contributions to religious institutions. The former method was lately before the Supreme Court in *Walz, supra*. The latter method has never been challenged in the Supreme Court. As the Court noted in *Walz*, the real property tax exemption provision for churches is two hundred years old. The acquiescence in the practice by the people, the historical absence of religious divisiveness, and the exemption's ancient origin were considered to lend support to its exclusion from the restraints of the religion clauses of the First Amendment.

In *Walz*, the Court recognized that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . ." 397 U.S. at 674; yet the New York statute granting to churches as well as other educa-

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tional and civic institutions exemption from real property taxes was sustained. The Court also noted in *Walz* that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

It certainly can be argued that if the power to tax is the power to destroy, the power not to tax is the power to support. The Supreme Court has not accepted that view, and has rejected the argument that exemptions do not differ from subsidies as a matter of economics.

Our distinguished colleague, Judge Hays, in his dissenting opinion assumes constitutional invalidity because the "purpose and effect of the statute [Part III] are . . . to subsidize religious training for children." Why, then, it may be asked, does not an income tax deduction for a contribution to a church "subsidize" religious worship for parents? If, indeed, "there is no essential difference between a parent's receiving a \$50 reimbursement for tuition paid to a parochial school and his receiving a \$50 benefit because he sends his child to a parochial school," then there should be no essential difference between a parent's receiving a \$50 "reimbursement" for a payment to his parish church and his receiving a \$50 "benefit" for the same payment. As Judge Hays states it, "in both instances the money involved represents a charge made upon the state for the purpose of religious education." With great respect, we paraphrase this to say that, in our illustration as well, it could be said that the money involved represents a charge made upon the State for the purpose of denominational worship. Yet we

Opinion of Gurfein and Cannella, JJ.

have abided this very condition in our taxing system for many years, although we know that some denominations conduct church-related Sunday Schools or even weekday afternoon classes in religion.

Whether the distinction is based on logic, history or simply on an authoritative guideline set by the Supreme Court, we may approach our difficult task with the distinction between subsidy and tax exemption in mind. It cannot be a perfect guide, for the statute involved in *Walz* gave real property tax exemption to a great many institutions, not only churches, there was no question of arbitrary classification, and alleged State involvement with religion was at least equivocal. On the other hand, in favor of its validity is the circumstance that under Section 3 of our statute, the income tax exemption (which is in effect a tax *credit* since the exemption is not intended to equal the parents' outlay) is to *individuals*, not to churches or church schools, a step removed. This kind of income tax relief, while not as old as property tax exemption because the constitutional income tax law itself is relatively modern, has been on the Federal statute books for more than half a century. It has been a consistent legislative policy ever since the 1917 Revenue Act for the Congress to permit the deduction of so-called charitable contributions from personal income.¹⁷ This has always included direct gifts to churches. The purpose is no doubt to encourage such contributions. 5 J. Mertens,

¹⁷ Revenue Act of 1917, c. 63, §1201(2), 40 Stat. 331. That statute allowed as a deduction, "[c]ontributions . . . made to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes."

Opinion of Gurfein and Cannella, JJ.

Law of Federal Income Taxation §31.01 (1969); *Bliss v. Commissioner*, 68 F. 2d 890 (2 Cir. 1934), *aff'd*, 293 U.S. 144 (1934).

We think that, aside from the "equal protection" problem which we do not pass upon, the credit against gross income of a fixed amount if tuition is paid to nonpublic schools, does not sponsor, or render forbidden financial support to church schools, at least in the limited form in which relief is given here. Credit is allowed not only to parents who pay tuition to a religious school but also to any nonprofit, nonpublic secular school. The table in the statute is geared roughly to the tax brackets and the rate of tax imposed on each bracket. The result ranges from a small, almost token, forgiveness to a family which attains an adjusted gross income of almost \$25,000 to a forgiveness roughly approximating the tuition cost of \$50 per child for a family in the lowest bracket. A memorandum prepared by Senator Brydges indicates that a family with three children in a nonpublic school would get a net benefit annually ranging from \$150 if the family has an adjusted gross income of less than \$9,000, to \$36 if the family has an adjusted gross income of \$24,999. The benefit is inverse to income. And we believe the Legislature has power to decide between allowing deductions and allowing credits.¹⁸

It seems to us unlikely, at least in the absence of strong proof, that a person having \$6,000 to \$9,000 per annum as an adjusted gross income would take his forgiveness or windfall, and hand it back to the parochial school as addi-

¹⁸ A deduction of \$150 for a person in a 6% tax bracket (\$7,000 to \$9,000) would have given him only a nine dollar benefit.

Opinion of Gurfein and Cannella, JJ.

tional tuition. He would, more likely, compensate himself for the tuition paid in an amount which would otherwise have gone to the State for income taxes. Thus, it is likely that while the State loses revenue, as it does generally in allowing charitable deductions, it does not aid the parochial school, as it may, indeed, do when it allows deductions for direct contributions to the church. If, in fact, persons in a somewhat higher bracket should forego the forgiveness and turn over the tax saving to the church, that would be a voluntary act, not different in kind from an ordinary church contribution. Indeed, it is to be hoped that at least part of the costs of educating poor children will come from this source.

Once we have hurdled the constitutional barrier to income tax benefit for contributions directly made to churches, as we believe we must, there is not much further to travel. It is true that the argument may be advanced as the dissenting opinion does that the parent receives a consideration in the education of his child, while there is no *quid pro quo* in a contribution to a church. And we understand that the Federal tax authorities do scrutinize contributions of parochial school parents with that yardstick. See *Fausner v. Commissioner*, 55 T.C. 620 (1971).

We are not dealing, however, with the interpretation of a revenue act but with an inquiry upon the limitations of the power of a State Legislature under the Federal Constitution. As a Court, we may not pass on questions of religious values or even adumbrate the moral or religious "consideration" that may accrue to the donor of a gift to the church of his choice.

Opinion of Gurfein and Cannella, JJ.

We put it more simply in practical terms. If a parishioner made a contribution to his parish, and the parish school were entirely free of tuition, would he be denied his income tax deduction because his child attended that school? Opinions may differ on the interpretation of present statutes, but it seems to us likely that an affirmative formulation by the Legislature would be constitutional.

We have not been asked to pass upon the constitutionality of part three on "equal protection" grounds, and we do not do so, cf. *Everson, supra*, 330 U.S. at 4-5.¹⁹ Putting such argument to one side, we think that the pressure on legislators to amend the income tax law is likely to be more from nonpublic school parents as a group rather than from parents of a single religious denomination. The principles of equity rather than of religious aid will probably be put to the fore if further liberalization by the Legislature is sought. And that we believe would not make for an inevitable excessive entanglement with religion in the legislative halls. As to administrative entanglement under part three of the statute, we see none beyond checking with the school simply to determine whether the tuition claimed to have been paid was actually paid.

We note, moreover, that the secular purpose as well as its effect is strong. The lightening of the tax burden of those who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary

¹⁹ There the Court refused to consider whether the apparent elusion of "private schools run for profit" violates the Equal Protection Clause of the Fourteenth Amendment, because the statute was not challenged on that ground.

Opinion of Gurfein and Cannella, JJ.

choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute. 1 J. Mertens, *supra*, §4.09. As we have said, however, we do not now deal with the "equal protection" argument, the reasonableness of the classification by those standards, or whether there is an appropriate governmental interest suitably furthered by the different treatment. See *Police Department v. Mosley*, — U.S. —, 92 S. Ct. 2286 (1972).

We hold only that Section 3 of the statute is not in conflict with the First Amendment Establishment Clause, as applied to the states through the Fourteenth Amendment.

We also find Section 3 of the statute separable from the parts found to be unconstitutional. The statute itself contains a separability clause (§11). And we are not required to invalidate the entire Act. See *Tilton, supra*, 403 U.S. at 683-84; *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932).

A permanent injunction will be issued against the enforcement of Sections 1 and 2 of the statute. Judgment will be entered accordingly, pursuant to Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay. A permanent injunction against enforcement of Section 3 of the statute will be denied. The complaint so far as it relates to Section 3 of the statute, will not be dismissed, however. The parties may move for summary judgment or for an expedited trial.

An order will be settled on notice.

Opinion of Gurfein and Cannella, JJ.

The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Dated: October 2, 1972.

/s/ PAUL R. HAYS
PAUL R. HAYS, *U. S. C. J.*
(Dissenting in part)

/s/ JOHN M. CANNELLA
JOHN M. CANNELLA, *U. S. D. J.*

/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN, *U. S. D. J.*

Opinion of Hays, C.J.

Hays, *Circuit Judge*, in part concurring in the result; dissenting in part:

I am in agreement with the view of my colleagues that the part of the state statute (N.Y. Laws of 1972, c.414) providing for grants to private schools for the maintenance of buildings cannot survive a challenge based on the Establishment Clause and the cases decided under it. *Tilton v Richardson*, 403 U.S. 672 (1971); *Lemon v Kurtzman*, 403 U.S. 602 (1971); *Walz v Tax Comm'n*, 397 U.S. 664 (1970); *Bd. of Education v Allen*, 392 U.S. 236 (1968); *Everson v Bd. of Education*, 330 U.S. 1 (1947). I agree with Judge Gurfein's view that the part of the statute providing for flat tuition grants to low-income parents is also unconstitutional. In addition to the cases previously cited see also *Wolman v Essex*, 342 F. Supp. 399 (E.D. Ohio, 1972) (three judge court); *Lemon v Sloan*, 340 F. Supp. 1356 (E.D. Pa., 1972) (three judge court). I therefore concur in the result reached by Judge Gurfein as to these aspects of the statute.

I dissent from the court's judgment concerning section 3 of the state act. I believe that that section, which provides for tax benefits with respect to tuition paid by the taxpayer for children attending religious schools, is also unconstitutional.

The purpose and effect of this provision of the statute are the same as the second portion, i.e., to subsidize religious training for children.¹ Both sections aim to reimburse

¹ Although section 3 is made applicable to parents whose children attend any nonprofit nonpublic school, the overwhelming majority of these parents are sending their children to religious schools where sectarian indoctrination takes place. According to the

Opinion of Hays, C.J.

parents who have chosen to send their children to religious schools. As Mr. Justice Jackson said:

"The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination." *Everson v Bd. of Education*, 330 U.S. at 24 (Jackson, J. dissenting).

And "[w]hat may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." *Abington School District v Schempp*, 374 U.S. 203, 230 (Douglas, J. concurring).²

The benefits of the tax exemption allowed by section 3 are of the same nature as those accorded under the tuition reimbursement provisions of section 2. There is no essen-

Fleischman Commission report, religious schools make up 93.5% of New York State's *nonpublic* schools. The remaining 6.5% consist of both profit-making and nonprofit-making private schools. Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary Education, "The Collapse of Nonpublic Education: Rumor or Reality?", Vol. 1, pp. 1-6. See Transcript in *Pearl v. Nyquist*, p. 64. The profit-making schools are not, of course, covered by section 3.

² In the context of racial discrimination, grants to schools, students or their parents to avoid the commands of the Fourteenth Amendment have been consistently struck down. See *Griffin v School Bd. of Prince Edward County*, 377 U.S. 218 (1964); *Hall v St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La., 1961), *aff'd*, 368 U.S. 515 (1962); *Lee v Macon County Bd.*, 267 F. Supp. 458 (M.D. Ala., 1967), *aff'd*, sub nom. *Wallace v United States*, 389 U.S. 215 (1967); *Brown v South Carolina State Bd.*, 96 F. Supp. 199 (D.S.C., 1968), *aff'd*, 393 U.S. 222 (1968); *Coffey v State Educ. Finance Comm'n*, 296 F. Supp. 1389 (S.D. Miss., 1969).

Opinion of Hays, C.J.

tial difference between a parent's receiving a \$50 reimbursement for tuition paid to a parochial school and his receiving a \$50 benefit because he sends his child to a parochial school. In both instances the money involved represents a charge made upon the state for the purpose of religious education.

The exemption of church property from ordinary taxation provides no analogy for the tax benefits of the present statute. The schools in the nonprofit nonpublic category in New York State are tax-exempt, N.Y. Real Prop. Tax Law §421 (1) (a) (McKinney Supp. 1971), and that status is not in dispute in this case. In *Walz v Tax Commission*, supra, the Court believed nearly two centuries of acquiescence in and approval of such exemptions lent support to the proposition that the exemptions did not violate the Establishment Clause. 397 U.S. at 680. Moreover, the Court noted in *Walz* that the State had not "singled out one particular church or religious group or even churches as such; rather it [had] granted exemption to all houses of worship within a broad class of property owned by non-profit, quasi-public corporations" *Id.* at 673. Here, as the three judge panel pointed out in *Wolman v Essex*, supra, "[t]he limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute." 342 F. Supp. at 412. Finally, the *Walz* court held (p. 674) that:

"Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

Opinion of Hays, C.J.

The *Walz* decision, as the Court said in *Lemon v Kurtzman*, supra, p. 614, "tended to confine rather than enlarge the area of permissible state involvement with religious institutions"

Nor does the present case concern the tax deductibility of religious contributions. Such contributions, even to church schools, are deductible under New York law, N.Y. Tax Law §360(10b) (McKinney 1966), and they would not be affected by the statute under scrutiny. Even assuming that tax deductions for contributions to religious schools are constitutional—a point not yet passed upon by the Supreme Court—we are not dealing with such deductions in the present case. A payment for services rendered is not a contribution, and such payments are not deductible. As the court said in *DeJong v Commissioner*, 36 T.C. 896, 899-900 (1961), aff'd 309 F.2d 373 (9th Cir. 1962):

"We are satisfied on the record before us that at least a portion of the \$1,075 paid by petitioners to the society was in the nature of tuition fees for the education which the society was expected to furnish to petitioners' children and was not in fact a true charitable contribution. Payments pledged and made by parents in the circumstances disclosed by the evidence were not voluntary and gratuitous contributions motivated merely by the satisfaction which flows from the performance of a generous act; they were induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the society's school."

Opinion of Hays, C.J.

See also *McLaughlin v Commissioner*, 51 T.C. 233 (1968); *Fausner v Commissioner*, 55 T.C. 620 (1971).

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.³

As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature would not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co. v Corporation Commission*, 286 U.S. 210, 234 (1932). It is obvious that the New York state legislature would not have

³ The following table shows the estimated net benefits to taxpayers under section 3. The information is taken from the memorandum which accompanied the bill. It was submitted to each legislator by Senator Brydges and was cited by the majority ante p.

If Adjusted Gross Income is	Income Exclusion Per Pupil is	Estimated Net Benefit to Family		
		One child	Two children	Three or more
less than \$ 9,000	\$1,000	\$50.00	\$100.00	\$150.00
\$ 9,000 - 10,999	850	42.50	85.00	127.50
11,000 - 12,999	700	42.00	84.00	126.00
13,000 - 14,999	550	38.50	77.00	115.50
15,000 - 16,999	400	32.00	64.00	96.00
17,000 - 18,999	250	22.50	45.00	67.50
19,000 - 20,999	150	15.00	30.00	45.00
21,000 - 22,999	125	13.75	27.50	41.25
23,000 - 24,999	100	12.00	24.00	36.00
25,000 and over	0	0	0	0

Opinion of Hays, C.J.

enacted section 3 benefiting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

For the foregoing reasons I respectfully dissent from the determination of the court as to the constitutionality of section 3.

Per Curiam Opinion Dated July 21, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

**COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAILBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON
AND CHARLES H. SUMNER,**

Plaintiffs,

—against—

**EWALD B. NYQUIST, as Commissioner of Education of the
State of New York ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,**

Defendants.

PER CURIAM

The motion for a declaratory judgment and to enjoin the implementation of Section 1 of Chapter 414 of the Laws of N.Y. 1972 to provide for maintenance and repair by the state for nonpublic schools is granted in favor of the plaintiff, upon the ground that it is in violation of the Establishment Clause of the First Amendment to the Constitution.

Per Curiam Opinion

We announce this result prior to the formalization of our opinion, because it has been suggested that a speedy disposition must be made of this matter in view of the many disbursements to be made in the legislative mandate.

We are reserving decision on the other matters in suit, since they are not as urgent, and since the court requires more time for decision.

Submit order on 5 days notice.

So ordered.

Dated: New York, N.Y.

July 21, 1972

/s/ PAUL R. HAYS
U.S.C.J.

/s/ JOHN M. CANNELLA
U.S.D.J.

/s/ MURRAY I. GURFEIN
U.S.D.J.

Order and Judgment Entered Oct. 20, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
 BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
 THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
 ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
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 ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
 DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
 and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
 State of New York, ARTHUR LEVITT, as Comptroller of
 the State of New York, and NORMAN GALLMAN, as Com-
 missioner of Taxation and Finance of the State of New
 York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
 NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
 ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
 President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Order and Judgment

Plaintiffs' motion for the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2281, 2284 having come on to be heard on June 20, 1972 before the Hon. Murray I. Gurfein, United States District Judge, and the parties having conceded at that time that this action required the convening of a three-judge District Court, and Judge Gurfein having set the matter down for a hearing during the week of July 3, 1972 upon a representation that there were no factual issues involved; and the case having thereafter come on to be heard on the merits on July 6, 1972 before Judge Gurfein, the Hon. Paul R. Hays, United States Circuit Judge, and the Hon. John M. Cannella, United States District Judge, and all parties having submitted briefs and presented oral argument; and the Court, after due deliberation, having concluded on July 21, 1972 that Section 1 of Chapter 414 of the 1972 Laws of New York is in violation of the Establishment Clause of the First Amendment to the United States Constitution, and the Court having set forth the reasons for this decision in an opinion dated October 2, 1972; and the Court having further concluded in its opinion of October 2, 1972 that Section 2 of Chapter 414 is unconstitutional and that Sections 3, 4 and 5 of Chapter 414 are not in violation of the Establishment Clause of the First Amendment, Judge Hays dissenting with respect to Sections 3, 4 and 5 of Chapter 414; and the Court having directed that judgment be entered, permanently enjoining enforcement of Sections 1 and 2 of Chapter 414; and the Court having further stated that the parties may move for summary judgment or for an expedited trial with respect to Section[s] 3 [and 4 and 5] of Chapter 414; and defendants and intervenor-defendants having duly moved for summary

Order and Judgment

judgment dismissing the complaint with respect to Sections 3, 4 and 5 of Chapter 414;

Now, upon all of the proceedings heretofore had herein, it is hereby

ORDERED, ADJUDGED AND DECREED that Section 1 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair; and it is further

ORDERED, ADJUDGED AND DECREED that Section 2 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of

Order and Judgment

any tuition payments heretofore or hereafter made to non-public elementary and secondary schools; and it is further

ORDERED, ADJUDGED AND DECREED that Sections 3, 4 and 5 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York be, and it hereby is, granted; and it is further

ORDERED that the complaint, insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York, be, and it hereby is, dismissed.

Dated: New York, New York
October 20, 1972

/s/ PAUL R HAYS
PAUL R. HAYS, *U.S.C.J.*

/s/ JOHN M. CANNELLA
JOHN M. CANNELLA, *U.S.D.J.*

/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN, *U.S.D.J.*

ENTERED: 10/20/72

/s/ JOHN LIVINGSTON
Clerk

**Notice of Appeal to the Supreme Court
of the United States**

[FILED OCTOBER 27, 1972]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Notice of Appeal

SIRS:

Notice is hereby given that intervenor-defendants Priscilla L. Cherry, Nora H. Ferguson and Adamina Ruiz hereby appeal to the Supreme Court of the United States from so much of the Order and Judgment entered in this action on October 20, 1972 as declares that Section 2 of Chapter 414 of the 1972 Laws of New York violates the Establishment Clause of the First Amendment to the United States Constitution and permanently enjoins "the defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or in reimbursement of any tuition payments heretofore or hereafter made to nonpublic elementary and secondary schools."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, N.Y.

October 26, 1972

Yours, etc.

DAVIS POLK & WARDWELL

By /s/ RICHARD E. NOLAN

A Member of the Firm

*Attorneys for Intervenor-
defendants Boylan, Cherry,
Ducey, Ferguson, Ferrarella,
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*Notice of Appeal***To:****LEO PFEFFER, Esq.***Attorney for Plaintiffs***15 East 84th Street****New York, New York 10028****HONORABLE LOUIS J. LEFKOWITZ***Attorney General of the State
of New York***Mrs. Jean M. Coon****Assistant Solicitor General****Attorney for Defendant****80 Centre Street****New York, New York 10013****JOHN F. HAGGERTY and****LOUIS P. CONTIGUGLIA, Esqs.***Attorneys for Intervenor-defendant***Senator Earl W. Brydges****Suite 2400****270 Broadway****New York, New York 10007**

Chapter 414 of the 1972 Laws of New York

AN ACT to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12

HEALTH AND SAFETY GRANTS FOR NONPUBLIC SCHOOL CHILDREN

Section 549. Legislative findings.

550. Definitions.

551. Apportionment.

552. Applications, reports, regulations.

553. Installments.

EXPLANATION—Matter in *italics* is new; matter in brackets [] is old law to be omitted.

Chapter 414 of the 1972 Laws of New York

§ 549. Legislative findings. The legislature hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

2. The state discharges this responsibility to public school children through substantial amounts of per pupil financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five, which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but none the less signifi-

Chapter 414 of the 1972 Laws of New York

cant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

§ 550. Definitions. In this article:

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d), (c) which is entitled to a tax exemption under section five hundred one(a) and five hundred one(c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).

3. "Base year" shall mean the school year immediately preceding the current year.

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4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.

5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session during such year.

§ 551. Apportionment. 1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiv-

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ing instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

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§ 552. *Applications, reports, regulations.* Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. *Installments.* The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July first, nineteen hundred seventy-one such apportionment shall be made in one payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A, to read as follows:

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ARTICLE 12-A

**ELEMENTARY AND SECONDARY EDUCATION
OPPORTUNITY PROGRAM**

Section 559. Legislative findings.

560. Short title.

561. Definitions.

562. Tuition reimbursement payments to parents.

563. Commissioner; powers.

§ 559. Legislative findings. The legislature hereby finds and declares that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

3. Quality education is made possible for all children in our state only because the burden of providing it has

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been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.

4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.

5. An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition reimbursement for parents of low income, in order to provide partial assistance in meeting the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.

§ 560. Short title. This article shall be known as the "Elementary and Secondary Education Opportunity Program".

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§ 561. Definitions. The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000 (d), and (iii) which is entitled to a tax

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exemption under section five hundred one(a) and five hundred one(c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar year exclusive of July and August.

§ 562. Tuition reimbursement payments to parents. 1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular

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school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such

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verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.

§ 563. Commissioner; powers. The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.

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2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subdivision, to be subdivision (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the

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table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragraph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

If New York
adjusted gross
income is:

The amount
allowable for each
dependent is:

Less than \$9,000	\$1,000
9,000—10,999	850
11,000—12,999	700
13,000—14,999	550
15,000—16,999	400
17,000—18,999	250
19,000—20,999	150
21,000—22,999	125
23,000—24,999	100
25,000 and over	—0—

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(2) *Husband and wife.* In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

(3) *Definitions.* (A) "Tuition", as used in this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. 2000(d) and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether non-

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public schools come within clause (i) as the state tax commission may require.

(C) "Regular school year", as used in this subsection, shall mean the months of the taxable year exclusive of July and August.

(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.

§ 6. Legislative findings. The legislature hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils, the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps intolerable, fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional

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tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

a. Definitions. As used herein:

1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school, during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.

2. borough shall mean any borough of the city school district of the city of New York.

3. aid ratio shall mean the higher of the actual aid ratio established for such district or borough, or thirty-six per centum.

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b. Computation. The amount to be apportioned shall be the product of:

1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and

2. the aid ratio of such school district or borough.

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ratio for each such borough.

d. Any apportionment as herein computed shall be subject to regulations promulgated by the commissioner and shall not be deducted in determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year and the school year next succeeding such year.

§ 8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having been amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively, as follows:

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1. No schoolhouse shall hereafter be erected, *purchased*, repaired, enlarged or remodeled in any school district except in a city school district in a city having seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specifications shall show in detail the ventilation, heating and lighting of such buildings.

In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may prescribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousand dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including

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fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection *or purchase* of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exits upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection *or purchase* of any school building or addition thereto or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of education shall not approve the plans for the erection *or purchase* of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment, accessibility; soil conditions; initial and ultimate cost.

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§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for an appraisal of such buildings as school buildings and the land on which they are situated as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two hundred thirty-four of the laws of nineteen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from

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its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, *purchase of existing structures*, for site purchase and improvement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs incidental to such construction or reconstruction, *or purchase of existing structures*.

a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed

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for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction *and the purchase of existing structures* the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven through nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the costs of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction *and the purchase of existing structures* may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

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§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two, and the provisions of paragraph (14) of subsection (c) of section six hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.

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FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-694

NOV 22 1972

MICHAEL RODAK, JR., CL

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Appellants,

against

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as
Commissioner of Taxation and Finance of the State of
New York,

Appellees,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M.
DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA,
ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Appellees,

and

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Appellee.

On Appeal from the United States District Court
for the Southern District of New York

**MOTION TO AFFIRM ON BEHALF OF
APPELLEE SENATOR EARL W. BRYDGES**

JOHN F. HAGGERTY and
LOUIS P. CONTIGUGLIA
*Attorneys for Appellee, Senator
Earl W. Brydges*
Office & P. O. Address

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IN THE
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No. 72-694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
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State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as
Commissioner of Taxation and Finance of the State of
New York,

Appellees,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M.
DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA,
ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Appellees,

and

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Appellee.

**On Appeal from the United States District Court
for the Southern District of New York**

**MOTION TO AFFIRM ON BEHALF OF
APPELLEE SENATOR EARL W. BRYDGES**

Pursuant to Rule 16 of the Rules of this Court, the Appellee, Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate, herein moves to affirm so much of the judgment of the Court below as declares constitutional Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State and grants summary judgment and dismisses Appellants' complaint with respect to such sections, on the ground that the question upon which review is sought has been rendered so unsubstantial by the well-reasoned opinion of the District Court that no further review by this Court is necessary.

Question Presented

The question presented in this appeal is the constitutionality under the First Amendment of Sections 3, 4 and 5 of Chapter 414 of 1972 Laws of New York State, which provide tax credits for tuition paid by parents for their children enrolled in nonpublic schools.

Statement of the Case

Appellee, Senator Earl W. Brydges, is the Majority Leader and President Pro Tem of the New York State Senate.

On May 25, 1972, Appellants, allegedly taxpayers of New York State, instituted this suit in the United States District Court for the Southern District of New York, praying, *inter alia*, that defendants, Ewald B. Nyquist, Commissioner of Education, Arthur Levitt, Comptroller, and Norman Gallman, Commissioner of Taxation and Finance, of the State of New York, be permanently enjoined from according tax benefits, pursuant to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State to

partially alleviate the financial burden on parents for educating their children in nonpublic schools.

Parents of children enrolled in nonpublic schools, namely, Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr. and Adamina Ruiz, were permitted to intervene as parties defendant. Similar permission was granted to Appellee, Senator Earl W. Brydges, Majority Leader and President Pro Tem of the New York State Senate.

On June 20, 1972, a three-judge District Court consisting of Hon. Paul R. Hays, a U. S. Circuit Judge; Hon. John M. Cannella and Hon. Murray I. Gurfein, U. S. District Judges, was duly constituted, pursuant to 28 U.S.C. §2281 and §2284, on consent of all parties. A hearing on the merits was held on July 6, 1972.

On October 2, 1972, Judge Gurfein handed down an opinion, with respect to tax credits, concurred in by Judge Cannella, declaring, *inter alia*, that Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State do not violate the Establishment Clause of the First Amendment. Judge Hays dissented in a separate opinion.

In upholding the constitutionality of tax credits for tuition paid by parents to nonpublic schools, the majority opinion reasoned, in part, as follows:

"The third part [Sections 3, 4 and 5] of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* non-profit private schools in the State, Second, it does not involve a subsidy or grant of money from the State Treasury as in Parts I

and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. See *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as to not involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the on-going political activity as likely, in our opinion, to cause division on strictly religious lines.”

ARGUMENT

There is little to add to Part III of the incisive majority opinion of the Federal District Court below with respect to the constitutionality of tax credits, which are provided for by Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State. The arguments raised by Appellants in their Jurisdictional Statement are basically a reiteration of those points contained in the dissenting opinion of Judge Paul R. Hays, which were specifically addressed and answered in the majority opinion. Appellee, therefore, relies in the main on Part III of the majority opinion of the Federal District Court for the Southern District of New York in support of his motion to affirm. Appellee wishes, however, to make these following additional arguments.

It is well settled that a state has very wide latitude in exercising its taxing power and in making exemptions from such taxes and that unless the classification is so palpably arbitrary and irrational that it serves no legiti-

mate state interest, the courts will not interfere in such matters. Any ground of difference having a fair and substantial relation to the object of the legislation is all that is required to sustain such classification, since all persons similarly situated are treated alike. *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 237 (1890); *Rogers v. Hennepin County*, 240 U. S. 184, 191 (1916); *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37, 40 (1928); *Allied Stores v. Bowers*, 358 U. S. 522, 526-528 (1959). In the latter case, the court found that exempting non-residents' merchandise in storage was a valid exercise of tax power by the state. The constitutional principles pertaining to a state's taxing authority was well stated by the Court in *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 509-510 (1931):

"It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. (Citation omitted). This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation. (Citations omitted).

"Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. *It may make distinctions of degree having a rational basis*, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. (Citations omitted).

"The restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the

enactment of laws, has the widest possible latitude within the limits of the Constitution. . . ." (Emphasis added).

The proper question is therefore whether the offering of a tax incentive to parents to expend their own funds on tuition of their children and thereby save the state substantial expenditure is a rational basis for granting such parents a tax credit for a small fraction of the savings inuring to the state.

The time may have arrived for a soul-searching examination into whether the "establishment" clause with all of the judicial gloss placed on it need be further expanded to stifle the will of the democratic organs to offer minimal assistance to parents who choose the parochial school over the public school. (See Concurring Opinion of Harlan, J., in *Walz v. Tax Commission*, 397 U. S. 690, 699 (1970).

It is respectfully submitted that this Court need not be the one to erect a barrier to the ability of parents to effectively exercise their constitutional prerogatives.

CONCLUSION

The judgment of the District Court should be affirmed with respect to the constitutionality of Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State because its decision has rendered unsubstantial the question which the appellants ask this Court to review.

Dated: November 20, 1972

Respectfully submitted,

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IN THE
Supreme Court of the United States**October Term, 1972****No. 694**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON
and CHARLES H. SUMNER,

*against**Appellants,*

EWALD B. NYQUIST, as Commissioner of Education of the State of New
York, ARTHUR LEVITT, as Comptroller of the State of New York,
and NORMAN GALLMAN, as Commissioner of Taxation and Finance
of the State of New York,

*and**Appellees,*

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA,
ERNEST E. ROOS, JR. and ADAMINA RUIZ,

*and**Appellees,*

SENATOR EARL W. BRYDGES, as Majority Leader and President
Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**MOTION ON BEHALF OF APPELLEES NYQUIST,
LEVITT AND GALLMAN TO DISMISS APPEAL OR
TO AFFIRM JUDGMENT APPEALED FROM**

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COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
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Appellants,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New
York, ARTHUR LEVITT, as Comptroller of the State of New York,
and NORMAN GALLMAN, as Commissioner of Taxation and Finance
of the State of New York,

Appellees,

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GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
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Appellees,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President
Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**MOTION ON BEHALF OF APPELLEES NYQUIST,
LEVITT AND GALLMAN TO DISMISS APPEAL OR
TO AFFIRM JUDGMENT APPEALED FROM**

Pursuant to Rule 16 of the Rules of this Court, the appellees Nyquist, Levitt and Gallman move to dismiss the appeal herein, on the ground that it does not present a substantial federal question, or to affirm the judgment appealed from, on the ground that the questions raised are so insubstantial as not to need further argument.

Statute Involved

The statute involved on this appeal is Chapter 414 of the New York Laws of 1972, set forth as an Appendix to the Jurisdictional Statement of the Appellants. The provisions of that Chapter at issue on this appeal are contained in sections 3, 4 and 5. Section 3 provides as follows:

"§ 3. Legislative findings. The legislature hereby finds and declares that:

"1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.

"2. Nonpublic educational institutions are themselves entitled to tax exempt status by virtue of legislation which has been sustained by the courts.

"3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for these children.

"4. Tax laws also authorize deductions for education related to employment.

"5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law."

Section 4 of the Chapter adds to the list of items to be subtracted from gross income, as computed for Federal income tax purposes, a paragraph 14 referring to the amount to be subtracted as provided in section 5 of the Chapter.

Section 5 adds a new subsection j to section 612 of the New York Tax Law (McKinney's Consolidated Laws), which section details the computation of adjusted gross income for the purposes of the New York State income tax. The new subsection provides:

“(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragraph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

If New York
adjusted gross
income is:

The amount
allowable for each
dependent is:

Less than \$ 9,000	\$1,000
9,000 — 10,999	850
11,000 — 12,999	700
13,000 — 14,999	550
15,000 — 16,999	400
17,000 — 18,999	250
19,000 — 20,999	150
21,000 — 22,999	125
23,000 — 24,999	100
25,000 and over	-0-

“(2) Husband and wife. In determining the applicable New York adjusted gross income of a husband and wife for the purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

“(3) Definitions. (A) ‘Tuition’, as used in this subsection shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

“(B) ‘Nonpublic school’, as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U. S. C. § 2000(d) and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) of the Federal Internal Revenue Code

of nineteen hundred fifty-four, as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state commission may require.

“(C) ‘Regular school year’, as used in this subsection shall mean the months of the taxable year exclusive of July and August.

“(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.”

Section 11 of Chapter 414 provides for the separability of remaining provisions of the statute from any part thereof which may be held invalid by a Court.

Questions Presented

1. Does a State statute, which authorizes a deduction from gross taxable income to parents paying nonpublic school tuition for their children, infringe upon the Establishment Clause of the First Amendment to the Constitution of the United States?

2. Where the interrelation of tuition reimbursement and income modification provisions in the statute are solely for the purpose of assuring that low income parents elect between one of the two provisions and do not receive a double benefit, are the provisions separable?

Statement of the Case

Plaintiffs commenced this action seeking to have sections 1, 2, 3, 4 and 5 of Chapter 414 of the New York Laws of 1972 declared unconstitutional, alleging that those provisions violate the Establishment Clause of the First Amendment to the Constitution of the United States. The complaint also sought an injunction restraining payments of State funds in implementation of sections 1 (health and safety grants to nonpublic school buildings) and of section 2 (tuition reimbursement to low-income parents) of the act and restraining the implementation of sections 3, 4 and 5 of the statute.

A motion to intervene in the action was made by several parents of children enrolled in nonpublic schools and who would be beneficiaries of the challenged provisions of the act. The motion was granted.

A motion to intervene in the action was also made by Earl W. Brydges, the Majority Leader and President *Pro Tem* of the New York State Senate. That motion was also granted.

The District Court, in its decision, specifically found that it accepted the findings of the Legislature as to the purposes of the enactments, and that those findings sum up legislative purposes which are secular in intent. Thus, as relevant to this appeal, the Court expressly started with the assumption that "taxpayers as a body have, indeed, been relieved up to now of the burden of providing public school education for the children who attend nonpublic schools" and that the legislative intent is to give tax relief to "our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools,

as is their constitutional right." Relying primarily upon the recent decisions of this Court in *Lemon v. Kurtzman* (403 U. S. 602 [1971]), *Tilton v. Richardson* (403 U. S. 672 [1971]), and *Walz v. State Tax Commission* (397 U. S. 664 [1970]), the Court held that public moneys may not be used for the repair or maintenance of nonpublic school buildings in which the religious and secular functions are combined (Chapter 414, section 1); and that the State could not provide for reimbursement to low-income parents for tuition paid by them to nonpublic schools which their children attend (Chapter 414, section 2). That Court's decision on those issues has been appealed to this Court by the defendants in the action.

As to the modification of gross income provided by sections 3, 4 and 5 of Chapter 414, the provisions at issue here, the majority of the Court found that those provisions stand in a different position. The Court found that the modification of income provision is not restricted to geographic areas which contain "practically only Catholic parochial schools"; that it covers attendance at all nonprofit private schools in the State; that it does not involve a subsidy or grant of money from the State Treasury; that it has a particular secular intent—one of equity—to give some recompense by way of tax relief to persons who both pay school taxes to support the public schools and also send their children to nonpublic schools; that the benefit to the parochial schools is so remote as to not involve any impermissible financial aid to church schools; and that these provisions result in a minimum of administrative entanglement with the nonpublic schools.

The Court equated the tax credit provisions of Chapter 414 with the property tax exemption held valid in the *Walz* case, *supra*. In both cases, the Court said, the tax relief

confers some indirect economic benefit upon religious institutions. In the instant case, however, the Court observed, the income tax exemption is to individuals, not to churches or schools, and is, thus, a step removed from the tax exemption to the institutions approved in the *Walz* case.

The Court specifically noted that both the secular purpose and effect of the tax relief provision is "strong", stating:

"The lightening of the tax burden of those who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute."

The dissenting Judge, Circuit Judge HAYS, would have held that there is no legal difference between tuition reimbursement, which the Court held invalid, and the modification of gross income for income tax purposes, which the majority of the Court held valid. The dissenting Judge also would have found the statutory provisions inseparable, thus invalidating sections 3, 4 and 5 because section 2 had been invalidated. Judge HAYS assumed that the tax relief provisions begin at the income point where tuition reimbursement leaves off. That, however, is not an accurate statement of the terms of the statute. Tuition reimbursement, under section 2 of Chapter 414, would be available to families with incomes of less than \$5,000. Tax relief would be available to anyone, having less than \$25,000 income, since the lowest category applies to persons with less than \$9,000 income. The statute merely requires an election between tuition reimbursement and tax relief.

ARGUMENT

I. The Establishment Clause.

The New York State Constitution, Article III, § 22 establishes the powers of the State Legislature in the enactment of income tax legislation. That section provides that the Legislature, in imposing any tax to be measured by income, may define the measure of the income to be taxed, and may prescribe exceptions to and modifications of any such provision at any time.

New York Tax Law (McKinney's Consol. Laws), § 612(a) provides that the New York adjusted gross income of a resident individual means his Federal gross income as defined by the laws of the United States. Generally, deductions and exemptions from gross income, for the purpose of determining net taxable income, are the same as those employed in determining Federal net taxable income. There are, however, additions to and exclusions from gross income which are provided solely in the New York State law. For example, a deduction is not allowed on State returns for income taxes paid to the State, although it is allowed on Federal returns; and deductions for life insurance premiums have been allowed on State returns, although not on Federal.

The addition of new subsection j to section 612 of the New York Tax Law, by Chapter 414 of the New York Laws of 1972, was no more and no less than an exercise of the State's inherent power to determine the measure of personal income subject to taxation by the State. Accordingly, it presents no substantial Federal constitutional question for resolution by this Court.

The new subsection adds a provision for modification of gross income, in determining net taxable income, for those

parents who pay tuition for their children attending non-public schools. The provision sets up the modification as a fixed amount deductible from gross income for each child, not exceeding three, attending nonpublic schools. The fixed amount varies, depending upon the unadjusted gross income of the parents, with the largest deduction available to those with the lowest incomes. A parent with an income less than \$5,000 must elect either the modification of gross income or tuition reimbursement provided by Education Law, Article 12-A, as added by Chapter 414 of the Laws of 1972, and may not obtain the benefits of both provisions.

This Court has recognized as a basic principle that a state has the inherent right to be free, in the normal exercise of the power to tax, to select the subjects of taxation and to grant exemptions from taxation, and that inequalities which may result from a singling out of one particular class for taxation or exemption from taxation infringes upon no constitutional rights or limitations upon the powers of the states. (*Carmichael v. So. Coal Co.*, 301 U. S. 495 [1937]; *People ex rel. Moffet v. Bates*, 276 App. Div. 38, affd. 301 N. Y. 597, cert. den. 340 U. S. 865 [1950]).

This Court has also held that the property of sectarian institutions may constitutionally be exempted from taxation (*Walz v. State Tax Commission*, *supra*). In so doing, this Court stated in that case (397 U. S., p. 678):

"Nothing in this national attitude toward religious toleration and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion, and on the contrary it has operated affirmatively to help guarantee the free exercise of all religious beliefs. Thus it is hardly useful to suggest that tax exemption is but the 'foot in the door' . . . leading to an established church."

As the Court below pointed out, while deductions from taxable income for contributions to sectarian institutions have not had 200 years of history, as has real property tax exemption for those institutions, this is because income taxation is of more recent vintage; but that, since the income tax laws have existed, tax deductions have been permitted for contributions to churches and to religious schools.

Recognizing that tax exemptions for nonpublic school tuition payments can work an indirect benefit to the schools, the Court below found no more of a benefit in such an instance than exists in tax exemption of religious property, an indirect benefit recognized but permitted by this Court's decision in *Walz*. As to the claim by the dissenting Judge in the instant case that tax deductions subsidize religious training for children, so, the majority of the Court below stated, does a tax deduction for contributions to a church subsidize religious worship. If the latter contribution is a valid tax deduction, why not the former as well? As to the argument made that in the case of contributions, the contributor does not receive a *quid pro quo* in exchange, while here his child receives an education, the majority of the Court below stated that that involves solely a problem of construction of the terms of a statute, the Internal Revenue Code, and not a constitutional question, since it is by the terms of the statute alone that a contribution must be made without value in exchange.

The Court also pointed out that the purpose of deductions for contributions is presumably to encourage those contributions and thus to benefit the churches. Appellant makes an argument that contributions to churches are made equally deductible with those to educational and charitable institutions which are nonsectarian in nature. If the purpose of permitting those contributions is to aid religion and

if that purpose is unconstitutional, it would not seem to matter whether the impermissible purpose was intermingled with permissible purposes. There is, for example, no constitutional barrier to State grants to nonsectarian private schools or to reimbursement of tuition paid to nonsectarian private schools, yet this Court has held, in *Lemon*, *supra*, and in *Essex* (*Essex v. Wolman*, 342 F. Supp. 399, *affd.* — U. S. — [Oct. 10, 1972]), that provisions which would also benefit sectarian schools were invalid.

In upholding the tax statute provisions, the Court below stated its rationale, holding:

"We think that . . . the credit against gross income of a fixed amount if tuition is paid to nonpublic schools, does not sponsor, or render forbidden financial support to church schools, at least in the limited form in which relief is given here. Credit is allowed not only to parents who pay tuition to a religious school but also to any nonprofit nonpublic secular school. The table in the statute is geared roughly to the tax brackets and the rate of tax imposed on each bracket. The result ranges from a small, almost token, forgiveness to a family which attains an adjusted gross income of almost \$25,000 to a forgiveness roughly approximating the tuition cost of \$50 per child for a family in the lowest bracket . . . And we believe the Legislature has power to decide between allowing deductions and allowing credits."

While the Court had held tuition reimbursement invalid on the ground, in part, that the parents are merely conduits for the money to the nonpublic schools (an issue which is the subject of defendants' appeal to this Court), in the case of the tax deductions, the Court found no traceable benefit to the schools, stating:

"It seems to us unlikely, at least in the absence of strong proof, that a person having \$6,000 to \$9,000 per annum as an adjusted gross income would take his forgiveness or windfall, and hand it back to the

parochial school as additional tuition. He would, more likely, compensate himself for the tuition paid in an amount which would otherwise have gone to the State for income taxes. Thus, it is likely that while the State looses revenue, as it does generally in allowing charitable deductions, it does not aid the parochial school, as it may, indeed, do when it allows deductions for direct contributions to the church. If, in fact, persons in a somewhat higher tax bracket should forego the forgiveness and turn over the tax saving to the church, that would be a voluntary act, not different in kind from an ordinary church contribution. Indeed, it is to be hoped that at least part of the costs of educating poor children will come from this source."

The Court also found a primary secular purpose to the tax relief statute, stating:

"We note, moreover, that the secular purpose as well as its effect is strong. The lightening of the tax burden of those who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute."

The Court below found no violation of the Establishment Clause of the First Amendment to the Constitution of the United States. We submit, that that Court was obviously correct in its holding. Consequently, there is no substantial Federal question which warrants the consideration of this Court, arising out of the State Legislature's exercise of its power to determine the measure of State taxation imposed on individual incomes. This appeal should, therefore, be dismissed or, in the alternative and based upon the opinion of the Court below, the decision should be affirmed insofar as it approves the modification of gross income provisions of the statute.

II. Separability.

The Court below found that the provisions of Chapter 414 are separable and that the provisions of sections 3, 4 and 5 of that statute could survive even though sections 1 and 2 were held invalid. The Court pointed out that the statute does contain a separability clause (§ 11) and further cited this Court's decision in *Tilton, supra*, in support of separability. In that case, this Court held a provision of the Higher Education Facilities Act of 1963 (20 U. S. C. §§ 711 *et seq.*) to be unconstitutional, but held that the remainder of the act was separable and valid. In so holding, the Court stated (403 U. S., pp. 683-684):

"The restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value. This circumstance does not require us to invalidate the entire Act, however. 'The cardinal principle of statutory construction is to save and not to destroy.' *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937). In *Champlin Rfg. Co. v. Commission*, 286 U. S. 210, 234 (1932), the Court noted

"The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

• • •

"We have found nothing in the statute or its objectives intimating that Congress considered the 20-year provision essential to the statutory program as a whole. In view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect."

The statute at issue in the instant case had three broad objectives: protection of the health and safety of children attending nonpublic schools; financial relief to parents of nonpublic school children, either in the form of tuition reimbursement or tax relief; and additional aid to public schools in areas where nonpublic schools are closed. Appellants do not question the separability of the statute where the aid to public schools is concerned. They question only the separability of that part which provides tax relief to parents of nonpublic school children. We submit that this statute clearly meets the test of separability as did the statute involved in *Tilton*.

There is no evidence that the Legislature would not have enacted the tax relief provisions independently of the provisions held invalid by the Court below (which are also on appeal to this Court). There is no showing that the health and safety grant provisions were essential to the statutory program as a whole, nor that tax relief provisions could not have or would have been passed independently of those provisions of the statute which have been held invalid. The excision of sections 1 and 2 of the statute would impair neither the operation nor administration of the remainder of the statute. It is, in fact, clear that the Legislature intended each part of the statute to be separable and to survive independently of the others when it included a separability clause in the statute. The only interrelation between the tax relief and tuition reimbursement provisions is a requirement that low-income parents elect only one form of relief. Tax relief is equally available to low-income parents and only the option to choose tuition reimbursement would be denied them by the invalidation of section 2 of the act.

Since the provisions of sections 3, 4 and 5 of chapter 414 of the New York Laws of 1972 are separable from those of sections 1 and 2 of the statute, the appeal raises no issue on this point which warrants the consideration of this Court. This appeal should, therefore, either be dismissed or the decision below, as to sections 3, 4 and 5 of the act, affirmed.

CONCLUSION

The appeal should be dismissed or the judgment appealed from affirmed.

Dated: November 20, 1972.

Respectfully submitted,

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 of New York
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JEAN M. COON
 Assistant Solicitor General

Of Counsel

THE JOURNAL OF THE
SOCIETY OF THE HISTORY OF THE
CITY OF NEW YORK
FOR THE YEAR 1880

The Society of the History of the City of New York, organized in 1847, has the honor to announce that the annual meeting of the Society will be held on the 10th of November, 1880, at the City Hall, New York. The subject of the meeting will be the "History of the City of New York, from its first settlement to the present time." The meeting will be held in the afternoon, at 2 o'clock, and will be open to all who are interested in the history of the City of New York.

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IN THE

DEC 4 1972

Supreme Court of the United States

MICHAEL RODAK, JR., CL

October Term, 1972

No. 72-694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON and CHARLES H. SUMNER,

Appellants,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Appellees,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Appellees,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION TO AFFIRM on behalf of APPELLEES
BOYLAN, DUCEY, FERRARELLA and ROOS**

PORTER R. CHANDLER

Attorney for Appellees

*Boylan, Ducey, Ferrarella
and Roos*

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Tel.: (212) HA 2-3400

RICHARD E. NOLAN
Of Counsel

IN THE
Supreme Court of the United States
October Term, 1972
No. 72-694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON and CHARLES H. SUMNER,

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Appellees,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Appellees,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION TO AFFIRM on behalf of APPELLEES
BOYLAN, DUCEY, FERRARELLA and ROOS**

Appellees Boylan, Ducey, Ferrarella and Roos are parents of nonpublic school children who qualify for modification of their New York adjusted gross incomes pursuant to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws

of New York and who intervened as parties defendant and actively participated in the proceedings in the District Court. They hereby join in the motions made by appellees Nyquist, Levitt and Gallman and by appellee Senator Earl W. Brydges to affirm so much of the judgment of the United States District Court for the Southern District of New York entered on October 20, 1972 as declared that Sections 3, 4 and 5 do not violate the Establishment Clause of the First Amendment to the United States Constitution, granted appellees summary judgment with respect to those sections and dismissed the complaint with respect thereto.

WHEREFORE, it is respectfully requested that the judgment of the District Court with regard to Sections 3, 4 and 5 be affirmed.

Dated: December 1, 1972

Respectfully submitted,

PORTER R. CHANDLER

Attorney for Appellees

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and Roos*

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RICHARD E. NOLAN

Of Counsel

FILE COPY

Supreme Court, U.
FILED

JAN 2 1973

IN THE
Supreme Court of the United States

MICHAEL RODAK, JR., C.

OCTOBER TERM, 1972

Nos. 72-753-72-791

72-929

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Appellants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCHEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR., and ADAMINA RUIZ,

Intervenor-Appellants,

and

EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Appellant,

—against—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWAN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-753-72-791

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Appellants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
ROOS, JR., and ADAMINA RUIZ,

Intervenor-Appellants,

and

EARL W. BRYDGES, as Majority Leader and President
Pro Tem of the New York State Senate,

Intervenor-Appellant,

—against—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWAN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

The appellees herein make this motion pursuant to Rule 16 of the Rules of this Court to affirm the judgment of the District Court on the ground that the questions raised in the appeal are so insubstantial as not to require further argument.

Statute Involved

Chapter 414 of the New York Laws of 1972 is set forth as an Appendix to each of the Jurisdictional Statements filed herein.

Questions Presented

1. May a State, consistently with the Establishment Clause of the First Amendment to the United States Constitution, appropriate tax-raised funds for the maintenance and repair of nonpublic schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial and dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach?

2. May a State reimburse parents for tuition paid to such schools?

Statement of the Case

The appellees adopt the Statements of the Case as set forth in each of the Jurisdictional Statements filed herein.

ARGUMENT

I.

The Maintenance and Repair Provision

In *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971), the Court held unconstitutional on their face Pennsylvania and Rhode Island statutes which appropriated tax-raised funds to pay part of the salaries of teachers of secular subjects in nonpublic schools. The basis for the decisions in both cases was that the statutes unavoidably involved the state in excessive entanglement with religious schools in violation of the Establishment Clause of the First Amendment.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court upheld in part the facial constitutionality of Title I of the Higher Education and Facilities Act of 1963 (20 U.S.C. Secs. 711-721) providing for Federal financing of construction of facilities at nonpublic as well as public colleges. The statute provides that for twenty years the financed facilities may not be used for sectarian instruction or religious worship.

The plurality opinion in *Tilton* distinguished *Lemon-DiCenso* on two grounds: First, *Tilton* involved colleges,

while *Lemon-DiCenso* involved elementary and secondary schools. Second, the *Tilton* statute authorized a one-time single purpose grant, while *Lemon-DiCenso* authorized continuing financial relationships.

Neither of these two distinguishing factors is present in Chapter 414. The beneficiaries of the Act are not colleges but elementary and secondary schools, and the financing takes place annually rather than only once for all time. Absent these two distinguishing factors, it is clear that the Act falls within the strictures of *Lemon-DiCenso*.

But most important is the Court's disposition of the twenty-year limitation in the Federal statute. Whereas the rest of the statute was held to be constitutional on its face (though not necessarily as applied) by a 5 to 4 vote, the Court was unanimous in invalidating the limitation. All the Justices agreed that buildings financed with tax-raised funds could never—not even after twenty years—be used for sectarian instruction or religious worship. In the present case, the statute on its face permits such use at all times, even within a day after the state grant is received. We submit such a law cannot stand under the decisions in *Lemon-DiCenso* and *Tilton*.

Finally, we note that even in *Tilton*, Mr. Justice White, whose vote made up the majority upholding the statute on its face, was careful to state that the statute would be unconstitutional even if no sectarian instruction or religious worship took place in the publicly financed facilities if "any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith." (403 U.S. at 671.) In the present case, it is conceded that the statute applies equally to schools which do exactly that.

We do not see how it is constitutionally significant that the qualifying schools must be located in low income areas. The Constitution of the United States extends to these no less than to other areas. We know of no decision of any court, state or Federal, which has ruled to the contrary and none is cited by appellants.

II.

The Tuition Grants Provision

The District Court was unanimous in holding unconstitutional the tuition grants provision of Chapter 414. So, too, were the District Courts in *Wolman v. Essex*, 342 F. Supp. 399, affirmed — U.S. —, 93 S. Ct. 61 (1972), and *Lemon v. Sloan*, 340 F. Supp. 1356 (1972). Appellants seek to distinguish the latter two cases on the ground that the statutes there provided tuition reimbursement for all children attending nonpublic schools, whereas Chapter 414 provides for reimbursement only to low income parents.

We are unable to see how this difference is constitutionally significant, nor do we know of any decision (and none is cited by the appellants) in which it was held that it is. We note further that the Rhode Island statute invalidated in *Earley v. DiCenso*, *supra*, was limited to teachers in low-income schools, i.e., those in which the average per-pupil expenditure was below that in the public schools, 403 U.S. at 607.

Tuition grant statutes are not a new device recently fashioned to evade constitutional prohibitions, state and Federal, against tax-financing of sectarian schools. As long ago as 1938, the New York Court of Appeals could say:

* * * The courts of this country have been unanimous in prohibiting the use of public funds to pay directly or indirectly, tuition fees of pupils in private or sectarian schools. *Judd v. Board of Education*, 278 N.Y. 200, 215. Overruled on other grounds in *Board of Education v. Allen*, 20 N.Y.2d 109.

Our research has failed to disclose a single decision, state or Federal, which has upheld the constitutionality of tuition grant laws. The decisions to the contrary are legion. Among them are the following: *Williams v. Board of Trustees*, 173 Ky. 708 (1917); *Opinion of the Justices*, 259 N.E.2d 564 (Mass. Sup. Jud. Ct., 1970); *Almond v. Day*, 197 Va. 419, 89 S.E.2d 851 (1955); *Swart v. South Burlington School District*, 122 Vt. 177, 167 A.2d 514, cert. den., 366 U.S. 925 (1961); *Hartness v. Patterson*, 179 S.E.2d 907 (S. Car. 1971).*

* We cite here only cases decided under the Establishment Clause or its state equivalents. Decisions rejecting tuition grants as a means of evading the Equal Protection Clause are reviewed in the opinion in *Wolman v. Essex*, *supra*, and are equally unanimous.

CONCLUSION

For the reasons set forth herein the judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorney for Appellees

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(212) 879-4500

December, 1972

APR 5 1973

MICHAEL RODAK, JR., C

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972**

**NO. 72-894, COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY VS. NYQUIST**

**NO. 72-753, BRYDGES VS. COMMITTEE FOR PUBLIC
EDUCATION AND RELIGIOUS LIBERTY**

**NO. 72-791, NYQUIST VS. COMMITTEE FOR PUBLIC
EDUCATION AND RELIGIOUS LIBERTY**

**NO. 72-929, CHERRY VS. COMMITTEE FOR PUBLIC
EDUCATION AND RELIGIOUS LIBERTY**

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
CONVENED PURSUANT TO TITLE 28,
SECTIONS 2281 AND 2283**

**MOTION AND BRIEF OF SIDNEY A. SEEGBERS, STANLEY
P. BABIN, F. CHARLES DELANA, ARTHUR F. LAMM,
ALFRED J. O'BANION, MRS. MARY ELLIS ROCHE,
THEODORE H. SHEPHARD, JR., MRS. VELMA D. SNOW,
MRS. CATHERINE N. CORY AND MRS. MADELYN WILLIS
AS AMICI CURIAE**

**Victor A. Sachse
Robert P. Breazeale and
Frank P. Simoneaux of
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Baton Rouge, Louisiana 70801**

Attorneys for Amici Curiae

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Sidney A. Seegers, Stanley P. Babin, F. Charles Delana, Arthur E. Lamm, Alfred J. O'Banion, Mrs. Mary Ellis Roche, Theodore H. Shephard, Jr., Mrs. Velma D. Snow, Mrs. Catherine N. Cory, and Mrs. Madelyn Willis, respectfully move this Court for leave to file the accompanying brief in this case as *amici curiae*. The consent of the attorney for the Committee on Public Education and Religious Liberty herein has been obtained, but the attorneys for the other litigants have neither consented nor refused to consent, nor otherwise responded to the request of applicants for consent to the filing of a brief by applicants as *amici curiae*.

The applicants herein have an interest in this case in that they now have pending in the United States District Court for the Middle District of Louisiana, petitions attacking like laws enacted by the Legislature of Louisiana, to-wit, Acts 93 and 94 of the Legislature for 1972, in which the basic question involved is the same as that presented for decision in the instant case. It is believed that there are state constitutional points involved as well as federal constitutional points, and this Court has held that where the Federal Court has jurisdiction it is authorized to determine all the questions in the case, local as well as federal, and has considered state constitutional standards in the interpretation of the constitution.

While applicants' cases are not now before this Court, they may well be in the near future and it is believed that the argument made by applicants in the accompanying brief should be received.

By Attorneys:

BREAZEALE, SACHSE & WILSON

By: _____
Victor A. Sachse

By: _____
Robert P. Breazeale

By: _____
Frank P. Simoneaux

LEO PFEFFER

ATTORNEY AT LAW

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TRAFALGAR 9-4300

January 26, 1973

Victor A. Sachse, Esq.
Breazeale, Sachse & Wilson
Suite 701 Fidelity National Bank Building
Baton Rouge, La. 70801

Re: 72-694, Committee for Public Education
v. Nyquist
72-753, Brydges v. Committee for Public
Education
72-791, Nyquist v. Committee for Public
Education
72-929, Cherry v. Committee for Public
Education

Dear Mr. Sachse:

Consent is hereby given to your filing a brief amicus curiae
in the above entitled cases.

Yours very truly,

/s/ Leo Pfeffer

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3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-694, COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY VS. NYQUIST

NO. 72-753, BRYDGES VS. COMMITTEE FOR PUBLIC
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NO. 72-929, CHERRY VS. COMMITTEE FOR PUBLIC
EDUCATION AND RELIGIOUS LIBERTY

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
CONVENED PURSUANT TO TITLE 28,
SECTIONS 2281 AND 2283

BRIEF OF SIDNEY A. SEEGER, STANLEY P. BABIN,
F. CHARLES DELANA, ARTHUR E. LAMM, ALFRED J.
O'BANION, MRS. MARY ELLIS ROCHE, THEODORE H.
SHEPHARD, JR., MRS. VELMA D. SNOW, MRS.
CATHERINE N. CORY, AND MRS. MADELYN WILLIS
AS AMICI CURIAE

By leave of this Court, Sidney A. Seegers, Stanley P. Babin, F. Charles Delana, Arthur E. Lamm, Alfred J. O'Banion, Mrs. Mary Ellis Roche, Theodore H. Shephard, Jr., Mrs. Velma D. Snow, Mrs. Catherine N. Cory and Mrs. Madelyn Willis, file this brief as amici curiae.

INTEREST OF THE AMICI CURIAE

The amici curiae, Sidney A. Seegers, et al, have an interest in this case in that they now have pending in the United States District Court, Middle District of Louisiana, two petitions for preliminary injunctions, seeking to enjoin Joseph N. Traigle, Collector of Revenue for the State of Louisiana, from giving tax credits or otherwise implementing Act 93 of the 1972 Louisiana Legislature, and also to enjoin Louis J. Michot, Superintendent of Education for the State of Louisiana, from making any payments from public funds of the State of Louisiana to implement Act 94 of the 1972 Legislature. These cases (Sidney A. Seegers, et al vs. Joseph N. Traigle, Collector of Revenue for the State of Louisiana - Civil Action No. 72-254, and Sidney A. Seegers, et al vs. Louis J. Michot, Superintendent of Education for the State of Louisiana - Civil Action No. 72-255, United States District Court, Middle District of Louisiana), involve the same basic question as that presented for decision in the instant case, that is, whether a state can reimburse parents for a portion of the tuition to send their children to private schools directly or by granting a credit against the state income tax due by persons for a portion of the tuition paid by them to private schools.

SUMMARY OF ARGUMENT

A. REIMBURSEMENT OF TUITION

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson vs. Board of Education*, 330 U.S. 1, 16, (1947).

B. The New York statute as well as the Louisiana statutes provide reimbursement to parents for tuition they pay to pri-

vate schools without a distinction between secular and religious teaching, and therefore tax raised funds are directly used for the advancement of religious activities contrary to the First Amendment to the United States Constitution.

C. Budgets for churches, synagogues and parochial schools cannot be made divisible by simply ascribing a percentage of costs to neutral functions. General services, such as transportation, secular books, free lunches and related activities may be afforded to students in all schools but may not be carved out as a special program for students who attend parochial schools only. *Walz vs. Tax Commission of New York City*, 397 U.S. 664 (1970); *Lemon vs. Kurtzman*, 403 U.S. 602 (1971).

D. Tax credits whose benefits are enjoyed almost exclusively by a sectarian class must be considered like direct monetary grants or reimbursements. As such, tax credits will tend to substantially increase the likelihood of significant political controversy regarding the dollar amount of benefit received by the parents of children in private schools. *Koysdar vs. Wolman*, Civil Action No. 72-212, United States District Court, Southern District of Ohio (December 29, 1972); *Lemon vs. Kurtzman*, 403 U.S. 602 (1971).

E. By acts of Congress the Constitutions of all States admitted to the Union since 1876 require the States to maintain a school system free from sectarian control, and the Constitutions of all but five of the States in the Union make like requirements, and state standards on constitutional questions are a proper consideration for this Court in the resolution of such questions. By such standards also the New York act is unconstitutional in all of its aspects.

ARGUMENT

The First Amendment of the United States Constitution made applicable to the states by the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)), provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

In *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court inquired into the meaning of the "establishment of religion" clause and concluded that a law which aids or supports religious schools comes within the prohibition of this clause. In *Walz v. Tax Commission of New York City*, 397 U.S. 664 (1970) this Court extended this view:

"A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." 403 U.S. 602, 612.

In *Lemon v. Kurtzman*, 403 U.S. 602 (June 28, 1971), this Court struck down state statutes which would have provided salaries for teachers of secular subjects in sectarian schools, pretermittting any question of the merit of benefits of the schools involved. The Court declared:

"* * * Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. * * *" 403 U.S. 602, 625.

It is recognized that the men who insisted upon the first ten amendments as a condition for the adoption of the Constitution had acquired not only by formal education but from first hand experience a basis for insight as to government unequalled by any known to us. They knew how much sectarianism had dominated the European scene in England as

well as on the continent, and how much it had to do with the coming to America of many of the colonists seeking religious freedom for themselves, and later according it to others. Examples of the latter action are Maryland's Toleration Act (1649) and the Charter of Rhode Island (1663). Other important documents leading to the First Amendment must include Samuel Adams, *The Declaration of the Rights of Men* (1772); John Adams, *Feudal and Canonical Law* (1768), the First Continental Congress' Declaration of Rights and Liberties (1774); Virginia's Declaration of Rights (1776); the Bill of Rights of Maryland (1776); the Bill of Rights of New York (1777); and the Bill of Rights of Massachusetts (1780); and also Virginia's The Act for Establishing Religious Freedom (1785).

In a short span of years many of the men who formed the Constitution and wrote the American Bill of Rights had experienced the limited monarchy which followed the peaceful revolution of 1688 in England and continued through the French and Indian War of 1756 to 1763, the growing tyranny under George III and his Lord North, the Confederacy of the Revolution, and the utter necessity for free men to establish a stable government but with restrictions on its power and to make certain that religious fervor never would be permitted to limit the freedom of the people.

As the Virginia action played so great a part in leading to the First Amendment, we quote a portion of its Act of December 16, 1785:

"* * * that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his

pattern, and whose powers he feels are most persuasive to righteousness . . ."

With this preamble, the Assembly adopted the Act itself which reads in part:

"II. Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or Ministry whatsoever; * * *" (our emphasis)

By 1876 this principle was so well established throughout the nation that thereafter each State admitted into the Union was required by Congress to provide in its Constitution the obligation to maintain a school system free from sectarian control.

North Dakota)	
South Dakota)	25 Stat. 677 Feb. 22, 1889
Montana)	Ch 180 Sec. 4
Washington)	
Utah		28 Stat. 107 July 16, 1894
		Chap 138 Sec. 3
Oklahoma		34 Stat. 270 June 16, 1906
		Chap 3335 Sec. 3
New Mexico		36 Stat. 559 June 20, 1910
		Chap 310 Sec. 2
Arizona		36 Stat. 570 June 20, 1910
		Chap 310 Sec. 20
Alaska		72 Stat. 342 July 7, 1958
		Public Law 85-508 Sec. 6
Hawaii		73 Stat. 4 March 8, 1959
		Public Law 86-3 Sec. 5

Note: Idaho (26 Stat. 215) and Wyoming (26 Stat. 222) did not specifically refer to freedom of public schools from secular control but instead merely stipulated that their respective constitutions which included the same principle were properly drawn.

Until the decisions of this Court made applicable to the States, through the Fourteenth Amendment, the First Amendment to the United States Constitution, such issues were usually dealt with in the State courts but the State courts had no difficulty in deciding long ago that public funds could not be used to support sectarian schools directly or indirectly. We refer the Court to *Synod of Dakota v. State of South Dakota*, 14 L.R.A. 418 (1891). There plaintiff, a sectarian school, sued the defendant State to recover an amount of money allegedly due it for the tuition and instruction of a class of students under an alleged contract made with the plaintiff by the board of education. We quote some of the relevant portions of the opinion:

"[I]t becomes necessary to determine whether or not the State can be required to pay for the services rendered by the plaintiff in view of the provisions of the State Constitution. The provisions of the Constitution of the State bearing upon the question are the last clause of section 3, art. 6, and section 16, art. 8. Section 3, art. 6, provides that 'no money or property of the State shall be given or appropriated for the benefit of any sectarian or religious society or institution;' and section 16, art. 8, provides that 'no appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the State or any county or municipality within the State . . . * * * These provisions of the Constitution were intended to be, and are self-executing. They require no act of the Legislature to become operative, but of themselves control all legislation upon the subject of appropriating money or other property for 'the benefit of' or 'to aid' any sectarian school or institution, made after the adoption of the State Constitution, and also control and limit the powers of all state, county, or municipal officers in auditing or paying any such appropriation. * * * The question, then, is, What constitutes an appropriation for 'the benefit of' or 'aid to' a sectarian school or institution?

That such a appropriation is not limited to a gift or donation on the part of the State is clearly shown in section 3, art. 6, which provides: 'No money or property of the State shall be given or appropriated.' The State is not only prohibited from giving or donating state funds, but from appropriating them. The term 'appropriation' used in this connection with 'gift,' was evidently intended to mean something different from gift or donation. * * * It is apparent from these various provisions that the framers of our State Constitution intended to guard with zealous care the funds of the State, counties, and municipalities, collected from taxes imposed upon all the members of the community, composing the various religious sects, from being appropriated for the benefit of or to aid any one or more sectarian schools or institutions, or in fostering or building up any one or more sects within the State. The policy of prohibiting the use of funds belonging to all for the benefit of one or more religious sects has been adopted in most of the states. No one, we think, can mistake the intention of the framers of the Constitution, as expressed in these various sections of that instrument, to prohibit in every form, whether as a gift or otherwise, the appropriation of the public funds for the benefit of or to aid any sectarian school or institution. What, then, constitutes benefit or aid? Webster defines 'benefit' to mean 'whatever contributes to promote prosperity: . . . add value to property; advantage; profit.' 'To aid' is defined by the same author 'to support, either by furnishing strength or means to help success.' The demand of plaintiff is for money due for the tuition of a class of students alleged to have been instructed under a contract with the board of education. Would not the payment of this demand be for the benefit of or to aid the university? Is not the tuition received from every student for the benefit of or to aid the school, to support, to strengthen it? Do not such institutions depend mainly upon the tuition fees of students they can obtain for their support? But the learned counsel for plaintiff stren-

uously contends that the sum due plaintiff will not be contributed for the benefit of or to aid the university, but in payment for services rendered the State, or to its students, in preparing them for teaching in the public schools. This contention, while plausible, is, we think, unsound, and leads to absurd results. If the State can pay the tuition of twenty-five students, why may it not maintain at the institution all that the institution can accommodate, and thereby support the institution entirely by state funds? The theory contended for by counsel would, in effect, render nugatory the provisions of the Constitution, as the claim that the appropriation was made as compensation for services rendered could be made in all cases. This theory, carried out to its legitimate results, would enable any one leading sect to control the schools, institutions, and funds of the State, as it could claim it was rendering services for the funds appropriated. It was undoubtedly to prevent such possible results that these provisions were inserted in the Constitution. It matters not how much consideration has been given by services rendered, the language is emphatic and unqualified that no money shall be given or appropriated for the benefit of or to aid any sectarian school, society, or institution. The paying of the tuition of pupils in the Pierre University to the plaintiff in this case will, in our opinion, be for the benefit of or to aid such school or institution, and is clearly within the prohibition of the Constitution.

* * *

"The fact, therefore, that the purpose for which plaintiff was organized and exists was and is generally to maintain and promulgate the doctrines and belief of one particular sect, constitutes the university under its control a sectarian school or institution, within the meaning of section 3, art. 6, and section 16, art. 8, of our State Constitution; and the State is therefore prohibited from appropriating to it any

of the public funds collected from taxes paid by the public and contributed by members of all the different religious sects of the State."

As recently as *Seegers v. Parker*, 256 La. 1039, 241 So.2d 213 (October 19, 1970), rehearing denied November 25, 1970, the Louisiana Supreme Court, dealing with similar State constitutional provisions nullified Louisiana statutes which would have provided salaries for teachers, saying:

"If the state is not intrusive upon and limiting of the free administration of sectarian institutions, secularity cannot be assured, and advancement of religion will ensue. And if the state acts zealously to guard the establishment principle and the legislative intent, its entanglement and involvement will most surely inhibit, deter, alter, and impinge upon religious freedom. The conflicts of state and religion which will emanate from the administration of this act are the very evil sought to be avoided by Article 1, Section 4, of our Constitution. Those who now seek Caesar's gold will one day seek redress from the payment to Caesar of that which invariably comes with his gold, his control." 256 La. 1039, 241 So.2d 213, 220.

This Court denied certiorari, *Williams v. Seegers*, 403 U.S. 955 (June 28, 1971).

Most states have never sought to require children to attend public schools only, and children in most states have freely attended sectarian schools. When the State of Oregon attempted to administer its compulsory education act otherwise, this Court readily held that the State could not interfere with parents sending their children to religious schools. *Pierce v. Society of the Sisters*, 268 U.S. 519 (1925). Nor did the Supreme Court of the State of Louisiana have difficulty in saying that the State could lend school books without charge to all children in public and private schools, sectarian and non-

sectarian. *Borden v. Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (1929), affirmed *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930). The rationale of the State decision, insofar as it relates to our issue was:

"True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them." (Emphasis supplied) 168 La. 1005, 123 So. 655, 660-668.

This Honorable Court reached the same conclusion long after in *Board of Education v. Allen*, 392 U.S. 236 (1968).

Meanwhile, this Court has said in *Everson v. Board of Education*, *supra*, that the state could pay for transportation of all school children to secular as well as public schools, but that,

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U.S. 16, 17 (Emphasis supplied)

No one can doubt that it is the obligation of the school to supply and pay for the teacher, hence the very essence of the school book law is absent here. The text book law was general in that it applied to all pupils in the state on the same basis in the form of a loan. The present tuition reimbursement and tax credit statutes are not general in nature because they specifically carve out parents of children in nonpublic schools as being eligible for certain financial advantage to be bestowed upon them by the State.

This Court in *Everson* placed great emphasis on the fact that the fare reimbursement legislation was a general program much like state maintained fire and police protection which inures to the benefit of the school children attending sectarian as well as public schools. This is a far cry from payment of salary to the teacher in the sectarian school for the teacher is selected and employed by the sectarian school. In sum, without teachers there would be no school. The public aid then goes to the very heart of the sectarian school and "government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education . . ." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Unlike ^{WALZ}~~Zorach~~ where the Court said that "(t)he nullification of this law would have wide and profound effects," the nullification of tuition reimbursement and tax credits for parents of children in private schools would go no farther than declare that public funds may not be used to aid in partial payment of tuition to private schools, a program not once seriously considered so far as we can determine by any state legislature until the year 1967, some 176 years after the adoption of the First Amendment.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), this Court upheld the constitutionality of the Higher Education Facilities Act (20 U.S.C. Sec. 201, et seq.) which authorizes grants of federal funds to institutions of higher education for construction of academic facilities, with the exception of a certain section thereof permitting the unrestricted use of the facilities so constructed after 20 years which was found unconstitutional. The result of *Tilton* must be understood in comparison with *Lemon*, *supra*, argued and decided concurrently with *Tilton*.

The Court in *Lemon* noted the difference between primary and secondary private schools and private institutions

of higher learning. The private institutions of higher learning were found to be free of religious control, the students were not apt to follow as quickly a religiously inclined teacher, and religion did not permeate the institution as in precollege schools.

"This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose." 403 U.S. 602, 616.

It appears to us that a clear line of distinction was drawn by two cases of the Court: (1) *People of the State of Illinois v. Board of Education*, 333 U.S. 203 (1948), generally referred to as the *McCorm* case and (2) *Zorach v. Clauson*, 343 U.S. 306 (1952). In *McCorm*, involving only released time for students, the program was one wherein "religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law." 333 U.S. 203, 205. The Court held the law to be unconstitutional and noted "the state's tax-supported public school buildings [are] used for the dissemination of religious doctrines." 333 U.S. 203, 212. Thus state support for the dissemination of religious doctrines was held to be unconstitutional.

In *Zorach v. Clauson*, *supra*, the Court distinguished the New York law saying:

"This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds. * * * The case is therefore unlike *McCorm* * * *." 343 U.S. 306, 308-309.

It is beyond any doubt that the purpose of such tuition

reimbursement and tax credit legislation is to aid religious schools and no one can doubt that religious schools exist largely to support the sect which established them.

In *Lemon v. Kurtzman*, *supra*, the Court noted that sectarian schools are vehicles for "inculcating religious doctrine . . . enhanced by the impressionable age of the pupils, in primary schools particularly." 403 U.S. 602, 616. The Court further said:

"We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation." 403 U.S. 602, 617.

"With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions." 403 U.S. 602, 618-619.

It is not sufficient to say that the payment of the salaries of teachers in religious schools through the reimbursement of tuition paid by parents or through tax credit to the parents for the amount of tuition paid is not entanglement. The *Lemon* decision, particularly the concurring opinion of Mr. Justice Douglas, in which Mr. Justice Black joined, cautioned that if the State does not intrude, secularity cannot be assured and the advancement of religion will ensue and if the States does act zealously to guard, the resulting entanglement will "make a shambles of the Establishment Clause." 403 U.S. 602, 627. So also said the United States District Court in Ohio. In *Kosydar, Tax Commissioner of Ohio v. Wolman*, and *Wol-*

man v. Kosydar, Nos. 72-212 and 72-222, decided by the District Court of the United States for the Southern District of Ohio, Eastern Division, on December 29, 1972, that Court disagreed with that portion of the *Nyquist* case, *supra*, which held valid the tax credit. Among other pertinent comments, the Court said:

"Where the state provides secular services generally, as where it provides police or fire protection to all schools including religiously affiliated ones, or bus transportation to all school students, including those attending parochial schools, the benefits flowing to organized religion are remote, minimal and incidental and not different from the benefits flowing generally to society. Not only are services of this kind religiously neutral in terms of effect, but they do not relatively advantage persons because of their religious identities. In this situation, it cannot seriously be maintained that there is a 'genuine nexus' between the state activity and the establishment of religion. *Walz v. Tax Commissioner*, *supra*, 397 U.S. at 675. Religion benefits from these publicly provided services only incidentally and only to the extent society has decided that it is desirable to maintain police, fire and transportation for all its constituent members. If the political process decides to amend its laws relative to the maintenance of these public facilities, by either increasing the level of services offered or decreasing them because of fiscal necessity, the political debate on these questions will almost surely not be drawn along religious lines. The bus transportation provided in *Everson*, the textbooks allowed in *Allen*, the property tax exemptions permitted in *Walz*, and the construction grants extended in *Tilton*, because they were extended to the broadest relevant class and because they were essentially secular in use terms, advanced religion only indirectly and incidentally. The dangers of religious fragmentation were, in each of those cases, minimal, and the Court had only to examine the administrative machinery of

the statutes involved to insure that the benefits would be conferred in a neutral fashion.

"Conversely, where the affected class is predominately religious or sectarian and the benefits provided are not inherently ideologically neutral, as where the state provides monetary grants to parents or institutions belonging to a class that is essentially religious in character, then, as a matter of law, the primary effect of such a statute is to advance religion, and the statute must be closely scrutinized for possible entanglement effects, primarily in terms of political entanglement. In our view, when a legislative enactment uses religion as an operative criterion or benefits one or more religious groups disproportionately to the community at large, it is highly suspect, and in all likelihood will be unable to survive such scrutiny.

"*Walz* involved the constitutionality under the Religion Clauses of a provision of the New York State Constitution and its implementing statute which granted complete state property tax exemptions to a broad class of private, non-profit charitable, educational and religious institutions. For example, were the state to tax churches and church related institutions, those unable to pay property taxes might be forced into abrasive foreclosure proceedings. This would increase, rather than decrease, the level of entanglement attendant upon allowing churches to remain in their exempt status.

"For the state to allow a credit to the parent who foregoes the use of the provided public facility in order to send his child to a private school, is to grant that taxpayer a relative economic advantage when compared to taxpayers generally. Where the class which is allowed this credit is a rational, non-suspect one under traditional notions of equal protection, such as where aid is provided to the handicapped, the state should be afforded great latitude in the use of its taxing power. However, where the benefitted

class is suspect because of a predominately sectarian character, an additional and very strict scrutiny must be made to insure that the state has not employed its taxing powers in a manner offensive to the Religion Clauses of the First Amendment. We conclude, on the evidence before us, that the class of persons who are beneficiaries of state aid under the present act remains predominantly sectarian, within the meaning of our previous holding in *Wolman*, at 412-413." (Emphasis added)

The whole course of the type of legislation with which the Court is confronted is the acknowledged effort of religiously oriented schools to obtain directly or indirectly state funds to supplement the dwindling or otherwise insufficient funds privately provided. Tuition is the lifeblood of all private schools and it is submitted that no public money - tax money - can constitutionally be provided directly or indirectly by reimbursement of tuition or by tax credit for persons who elect to send their children to private schools.

Leave to file this brief as amici curiae is respectfully sought. Further, it is prayed that the laws of New York seeking to provide reimbursement for tuition paid to private schools and tax credit for payments of tuition be declared unconstitutional.

Respectfully submitted,

BREAZEALE, SACHSE & WILSON

Victor A. Sachse

Robert P. Breazeale

Frank P. Simoneaux

CERTIFICATE

I, Victor A. Sachse, one of the attorneys for movers herein, and a member of the Bar of the Supreme Court of the United States, certify that a copy of the foregoing Motion for Leave to File Brief Amici Curiae and a copy of the brief in support of said motion have this day been mailed, with sufficient postage prepaid to: Mr. Leo Pfeffer, Attorney at Law, 154 East 84th Street, New York, New York 10028; Honorable Louis J. Lefkowitz, Attorney General, State of New York, State Capitol, Albany, New York 12224; Mr. John Haggerty, Senate Chambers, The Capitol, Albany, New York 12224; Messrs. Davis, Polk & Wardwell, Attorneys at Law, One Chase Manhattan Plaza, New York, New York 10005.

Baton Rouge, Louisiana, February _____, 1973.

Victor A. Sachse

MEMORANDUM

1. The purpose of this memorandum is to provide information regarding the proposed changes to the existing policy on the handling of confidential informants. The proposed changes are being made in response to the recommendations of the Committee on the Organization and Management of the Federal Bureau of Investigation, which was established in 1967 to study the Bureau's operations and to make recommendations for improvement. The Committee's report, dated June 1968, contains several recommendations that are being implemented. One of these recommendations is that the Bureau should establish a separate division to handle confidential informants. This division would be responsible for the recruitment, training, and supervision of confidential informants. The proposed changes to the existing policy are being made in order to ensure that the Bureau is able to effectively implement this recommendation. The proposed changes are being made in response to the recommendations of the Committee on the Organization and Management of the Federal Bureau of Investigation, which was established in 1967 to study the Bureau's operations and to make recommendations for improvement. The Committee's report, dated June 1968, contains several recommendations that are being implemented. One of these recommendations is that the Bureau should establish a separate division to handle confidential informants. This division would be responsible for the recruitment, training, and supervision of confidential informants. The proposed changes to the existing policy are being made in order to ensure that the Bureau is able to effectively implement this recommendation.

Very truly yours,
Director

FEB 23 1973

IN THE
Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1972

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellants,

—v.—

EWALD B. NYQUIST, etc., *et al.*,
Appellees.

WARREN M. ANDERSON, as Majority Leader and President Pro Tem.
of the New York State Senate,
Appellant,

—v.—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellees.

EWALD B. NYQUIST, etc., *et al.*,
Appellants,

—v.—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellees.

PRISCILLA L. CHERRY, *et al.*,
Appellants,

—v.—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Appellants,

—v.—

EWALD B. NYQUIST, etc., *et al.*,

Appellees.

WARREN M. ANDERSON, as Majority Leader and President Pro Tem.
of the New York State Senate,

Appellant,

—v.—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Appellees.

EWALD B. NYQUIST, etc., *et al.*,

Appellants,

—v.—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Appellees.

PRISCILLA L. CHERRY, *et al.*,

Appellants,

—v.—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

Preliminary Statement

The order of this Court noting probable jurisdiction in No. 72-694, *Committee for Public Education and Religious Liberty v. Nyquist*, No. 72-753, *Brydges v. Committee for Public Education and Religious Liberty*, No. 72-791, *Nyquist v. Committee for Public Education and Religious Liberty*, and No. 72-929, *Cherry v. Committee for Public Education and Religious Liberty*, directed that the cases be consolidated. By agreement among counsel, a single Appendix will be filed, each party's brief will cover the issues in all the appeals, and the appellants in 72-694 will be deemed the appellants in the consolidated appeal. The appellants in No. 72-694 will hereinafter be referred to as appellants-appellees, the appellants in the other cases as appellees-appellants.

Opinions Below

The majority and dissenting opinions of the District Court have not yet been reported. Copies of the opinions are set forth as appendices to the respective Jurisdictional Statements. In this brief, page reference will be to the opinions as set forth in No. 72-694 and will be preceded by the letters JS.

Jurisdiction

The decision of the District Court and the judgment thereon were rendered and entered on October 20, 1972. A notice of appeal was filed by appellants-appellees on November 3, 1972. Probable jurisdiction was noted on January 22, 1973.

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1253. *Lemon v. Kurtzman*, *Earley v. DiCenso*, 403 U.S. 602 (1971).

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in part:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *

The statute involved in this appeal is Chapter 414 of the 1972 New York Laws, set forth as appendices to the respective Jurisdictional Statements herein. In this brief, page references will be to the statute as set forth in No. 72-694 and will be preceded by the letters JS.

Questions Presented*

1. Does Section 1 of Chapter 414 of the 1972 New York Laws (hereinafter referred to as the Act), which provides for grants to church-controlled and church-operated schools for maintenance, repair and physical operation, violate the Establishment Clause of the First Amendment to the United States Constitution?

2. Does Section 2 of the Act, which provides reimbursement of up to 50% of the tuition paid to such schools, violate the Establishment Clause?

* Although appellants-appellees are appellees in respect to Sections 1 and 2 of the challenged statute, for reasons of logic and convenience we present and argue the questions in the same order as they appear in the statute and were argued and decided in the court below.

3. Do Sections 3, 4 and 5, which provide tax credits for tuition paid to such schools, violate the Establishment Clause?

4. If the answers to Questions 1 and 2 or either of them are in the affirmative and the answer to Question 3 in the negative, are Sections 3, 4 and 5 severable?

Statement of the Case

Chapter 414, the fourth of a series of laws enacted within two years which have been challenged as violative of the Establishment Clause,¹ contains five parts: (1) Section 1, which provides moneys to nonpublic schools for maintenance and repairs; (2) Section 2, which provides flat tuition grants to parents of pupils of low income families attending nonpublic schools; (3) Sections 3, 4 and 5, providing for tax credits for parents in middle and upper income families; (4) Sections 6 and 7, providing for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and (5) Sections 8, 9 and 10 which provide for the purchase of nonpublic school build-

¹ Chapter 138, Laws of 1970, financing "mandated services" in nonpublic schools, was declared unconstitutional in *Committee for Public Education and Religious Liberty v. Levitt*, 342 F. Supp. 439 (S.D. N.Y. 1972), probable jurisdiction noted 93 S. Ct. 316. Chapter 822, Laws of 1971, providing for payment of salaries of nonpublic school teachers, was held unconstitutional in *Committee for Public Education and Religious Liberty v. Levitt*, S.D. N.Y. 1971, unreported; no appeal was taken from that judgment. Chapter 996, Laws of 1972, confers jurisdiction on the State Court of Claims to accept claims from nonpublic schools for loss of payments by reason of the invalidation of the "mandated services" law; a suit challenging the constitutionality of the statute is pending in the United States District Court for the Southern District of New York, *Committee for Public Education and Religious Liberty v. Court of Claims*, 72 Civ. 2493.

ings by public school districts where the nonpublic school has closed down.

It is conceded by all parties that the nonpublic schools referred to throughout the Act include schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial and dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.²

As explained by Judge Gurfein (JS 6a-8a), Sections 3, 4 and 5 of the Act provide that an individual shall be entitled to subtract, for State income tax purposes, from his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a non-profit public school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such de-

² The complaint, paragraphs 8, 9 and 10, alleges that Chapter 414 is so construed and applied by the State of New York. The answer of the State does not deny this allegation. The answers of the respective intervenors-appellees-appellants do. However, they did not contest this allegation in the District Court and in any event based their motion for summary judgment dismissing the complaint in respect to Sections 3, 4 and 5 of Chapter 414 on the absence of any contested issue of facts. See paragraph 4 of Affidavit of Jean M. Coon in support of motion for summary judgment. It is thus clear that they too no longer challenge the allegation.

pendent.³ This exclusion may be taken only by parents with adjusted gross incomes of from \$5,000 under Section 2. The exclusion would be as much as \$1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers as shown in the footnote. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

The appellants-appellees herein, an organization committed to the protection of public education and religious liberty, and a number of taxpayers some of whom are parents of children attending public schools, instituted suit

³ The table is as follows:

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than \$9,000	\$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	0

Estimated Net Benefit to Family (see JS 45a)

One Child	Two Children	Three or more
\$50.00	\$100.00	\$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
—0—	—0—	—0—

challenging the constitutionality under the Establishment and Free Exercise Clauses of only parts 1, 2 and 3 (Sections 1-5) of the Act, and seeking judgment declaring their unconstitutionality and enjoining their enforcement.

Separate motions for intervention as parties defendant were made by a group of parents of children in nonpublic schools and by State Senator Earl W. Brydges, as Majority Leader and President *pro tempore* of the New York State Senate. Both motions were granted.

A three-judge court was duly convened, consisting of Circuit Court Judge Paul R. Hays and District Court Judges John M. Cannella and Murray I. Gurfein. After a hearing on the merits, the Court unanimously held parts 1 and 2 of the Act violative of the Establishment Clause. As to part 3, the Court was divided: Judges Cannella and Gurfein in an opinion written by the latter, held that this part did not violate the Establishment Clause; Judge Hays dissented. Judges Cannella and Gurfein also held that part 3 was severable from parts 1 and 2, and as to this too Judge Hays dissented.

Cross-appeals were filed by all the parties and in each case probable jurisdiction was noted by this Court.

State Senator Earl W. Brydges, having retired, Warren M. Anderson, his successor as President *pro tempore* of the New York State Senate, was substituted for him as intervenor-appellee-appellant.

Summary of Argument

Three tests have been used by this Court for measuring constitutionality under the Establishment Clause. They are: (1) the *Everson* test, which forbids financial support or subsidization of sectarian instruction or religious worship; (2) the *Schempp* test, which forbids governmental action whose purpose or primary effect is to advance religion; and (3) the *Walz* test which forbids governmental action that involves excessive entanglement in religion. Which ever of these tests is used, the result is the same; all the challenged provisions of the Act on their face and as construed and applied by the State of New York violate the Establishment Clause.

This Court has emphasized the historic background of challenged action and has accorded great weight to the long duration and universality of a challenged practice. Neither long duration nor widespread acceptance supports the constitutionality of any of the provisions of the Act here in issue; to the contrary, whatever history there is strongly suggests unconstitutionality.

While Section 1 of the Act, providing for maintenance, repair and operations, might possibly stand alone, Section 2, dealing with tuition rebates, and Sections 3, 4 and 5, providing for tax credits, are so clearly inextricably integrated that they must be adjudged to be inseverable and the unconstitutionality of either requires that the other be declared inoperative.

ARGUMENT

I.

The Establishment Clause forbids (1) governmental subsidization of sectarian instruction or religious worship, (2) action whose purpose or primary effect is to advance religion, and (3) excessive entanglement in religion.

A. *The Everson Principle*

In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court announced the principle that neither the Federal Government nor a state may, under the Establishment Clause, subsidize or finance sectarian instruction or religious worship. Since the challenged statute was upheld, this constituted dictum in *Everson*, and the opinion has itself been subject to criticism as being overbroad in its language.⁴ However, what was dictum in *Everson* became holding in later cases, such as *McColum v. Board of Education*, 333 U.S. 203 (1948), *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Tilton v. Richardson*, 403 U.S. 672 (1971). Moreover, the criticism of the overbroad language of the *Everson* opinion in no way impaired the validity and viability of the underlying principle.

Thus, in *McColum* the Court held that the *Everson* principle rendered unconstitutional a program of religious instruction on public school premises since the use of the premises constituted subsidization of the instruction.

In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court upheld the constitutionality of a program of released time for

⁴ See, e.g. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 670-71 (1970).

religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, because no expenditure of public funds or use of public buildings was involved. The Court said: "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education . . ." (343 U.S. at 314).

In *Abington School District v. Schempp*, 374 U.S. 203 (1963) the Court in invalidating devotional Bible reading in public schools, quoted from Mr. Justice Jackson's dissenting opinion in *Everson* that "There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby supported in whole or in part at the taxpayers' expense" (374 U.S. at 216).

In *Board of Education v. Allen*, 392 U.S. 236 (1963) the Court held, as it had in *Everson*, that where a state undertakes a secular program for the benefit of children, the program is not constitutionally impermissible merely because as an incidental by-product thereof religious educational institutions might benefit. That is a far cry from saying that government may make a direct financial grant to such an institution. This the Court made clear in the following language:

... The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. *Thus no funds or books are furnished to*

parochial schools, the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution. (392 U.S. 243-244. Emphasis added.)

As if to underline the critical distinction between aiding children and their parents on one hand and a direct financial grant to the religious institutions, the Court stated:

It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their students. There is some evidence that at least some of the schools did not; intervenor defendants [parents of children attending parochial schools] asserted that they had previously purchased all their children's textbooks. . . . (*Ibid.*).

Thus, *Allen*, unlike the present case, presents no instance of governmental financing relieving the sectarian school of an expenditure which it otherwise would have made.

In *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the Court in upholding the tax exemptability of religious institutions made it quite clear that it was not sanctioning governmental subsidization of religious instruction or worship. The whole tenor of the decision reflects a constitutional distinction between subsidy and exemption and an avoidance of anything that might be construed to impair the vitality of the basic *Everson* principle. Thus, the Court emphasized that

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to the churches but simply abstains from demanding that the church support the state. * * * (397 U.S. at 655)

Again, the Court said (at 674-675):

Granting tax exemptions to churches necessarily operates to afford an *indirect* economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. *In analyzing either alternative the questions are whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.* The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid. (Emphasis added.)

In *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971), the Court again relied on the *Everson* principle to invalidate state subsidization of the salaries of teachers of secular subjects in sectarian schools. Mr. Justice White,

the only dissenter in *DiCenso*, concurred in the reversal and remand in *Lemon* on the ground that if the statute authorized "blending of sectarian and secular instruction" this "would establish financing of religious instruction by the State" (403 U.S. at 670-671), and thus would violate the Establishment Clause.

In *Tilton*, the Court was unanimous in invalidating that part of the Higher Education and Facilities Act of 1963 which authorized the use of Federally financed buildings for sectarian instruction or religious worship after twenty years.

These, and other cases that might be cited,⁸ show that if there is any proposition in constitutional law which is firmly established it is that under the Establishment Clause government may not finance sectarian instruction or religious worship.

B. The Schempp Test

In *Schempp*, the Court, in invalidating a Bible reading statute under the Establishment Clause, said:

The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion (374 U.S. at 222).

⁸ E.g., *Johnson v. Sanders*, 319 F. Supp. 421 (D.C. Conn.) affirmed 403 U.S. 955 (1971); *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio) affirmed — U.S. —, 93 S. Ct. 61 (1972).

In *McGowan v. Maryland*, 366 U.S. 420, 453 (1961), the Court said:

• • • We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.

In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court resorted to history to establish that the purpose of a facially neutral law forbidding the teaching of evolution in publicly financed schools was to protect the fundamentalist interpretation of Genesis and the law could therefore not stand under the *Schempp* purpose-effect test.

Nevertheless, the Court has been more than reluctant to go behind the stated legislative purpose in measures for aid to religious schools,⁶ although it thereby practically eliminated purpose for the purpose-effect test, and has at least implicitly recognized what every newspaper reader knows, that sectarian pressures play a significant if not major role in the enactment of such measures.⁷ Each of the three parts of the Act contains a long recital of secular legislative purposes and in view of this Court's apparently firm policy of taking such recitals at face value, it would probably be fruitless to seek to show that there is less secularity therein than meets the eye. Yet, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), 92 S. Ct. 1526, the most recent exposition by the Court of the meaning and significance of the religion clauses

⁶ *Allen*, 392 U.S. at 243; *Lemon*, 403 U.S. at 612.

⁷ *Lemon*, 403 U.S. at 622-624.

the First Amendment, the relation of legislatively de-
 clared secular purpose to the values of the Establishment
 Clause was placed in proper perspective. The Court there
 did (406 U.S. at 214-15):

Long before there was general acknowledgment of the
 need for universal formal education, the Religion
 Clauses had specifically and firmly fixed the right to
 free exercise of religious beliefs, and buttressing this
 fundamental right was an equally firm, even if less
 explicit, prohibition against the establishment of any
 religion by government. The values underlying these
 two provisions relating to religion have been zealously
 protected, sometimes even at the expense of other in-
 terests of admittedly high social importance. The in-
 validation of financial aid to parochial schools by gov-
 ernment grants for a salary subsidy for teachers is but
 one example of the extent to which courts have gone
 in this regard, notwithstanding that such aid programs
 were legislatively determined to be in the public inter-
 est and the service of sound educational policy by
 States and by Congress. *Lemon v. Kurtzman*, 403 U.S.
 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971).
 See also *Everson v. Board of Education*, 330 U.S. 1, 18
 (1947).

In any event, however secular its purpose a statute can-
 be upheld under the *Schempp* test if a primary effect is
 to advance religion. In *Lemon-DiCenso*, the Court, having
 determined that the statutes were unconstitutional under
 the entanglement test, did not find it necessary to consider
 them under the purpose-effect test. In *DiCenso*, the District
 Court did address itself to the latter test and held the

Rhode Island statute unconstitutional under that test as well as under the entanglement test. Judge Coffin, speaking for the Court, said (316 F. Supp. 112):

The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental." Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance." The problem of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects; on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "the primary effect", as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.

Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' [intervenors' (?)] proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a re-

ligious institution by assigning the bulk of the institution's expenses to "secular" activities. • • •

In a footnote, Judge Coffin added:

Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCullum v. Board of Education*, 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. • • •

In *Tilton*, the Court held that the challenged statute did not on its face necessarily call for excessive entanglement with religion. Accordingly, it found it necessary to consider it under the purpose-effect test. Again it held that the purpose was secular and that its primary effect, as a whole, was likewise secular both on its face and in its application, finding that while the four defendant colleges were church-related, they were not sectarian, and noting that in other instances the government had disqualified colleges found to be sectarian (403 U.S. at 682). However, what is most relevant to the present case is that the Court in *Tilton* held that the provision allowing facilities partly financed with Federal funds to be used for sectarian instruction and religious worship after 20 years did in fact have a primary effect which necessarily advanced religion and therefore was unconstitutional on its face.

C. The *Wals* Test: Entanglement

In *Walz*, the Court held that even if the purpose and primary effect of a statute is secular, the statute cannot stand under the Establishment Clause if it brings with it an excessive entanglement of government with religion. The Court said (397 U.S. at 674):

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. * * *

In *Lemon*, the Court went out of its way to point out that the holding in *Walz* “tended to confine rather than enlarge the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship” (403 U.S. at 614). The Court said further (at 615):

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. * * *

For that reason, the complaint in this case alleged that the Act both on its face and as administered, encompasses as permissible beneficiaries schools which impose religious restrictions on admissions, require attendance of pupils at religious exercises, require obedience by students to the doctrines and dogmas of a particular faith, are an integral part of the religious mission of the church sponsoring them, have

as a substantial purpose the inculcation of religious values, impose religious restrictions on faculty appointments, and impose religious restrictions on what or how the faculty may teach.

These indicia of religiosity were culled from the various opinions in *Lemon*, *DiCenso* and *Tilton* and indicate the "character and purposes" of institutions which the Court would hold ineligible under the *Walz* test. In *Tilton*, the plurality opinion deemed use of such a "profile" to be inappropriate because none of the defendant colleges fitted the profile and colleges which did were held by the government to be ineligible to receive benefits (403 U.S. at 682).

The exact opposite is the case here. As we have pointed out (*supra*, p. 5), all parties concede that institutions fitting this description are eligible to receive benefits under the Act. It may well be that there are few schools in New York which fit the profile in every detail, but it is quite obvious that far less is necessary to establish unconstitutionality; indeed, we suggest, any one of them would be enough. Thus, Mr. Justice White, in his concurring-dissenting opinion in *Tilton-Lemon-DiCenso* stated that if any school restricted entry on religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith, the legislation would to that extent be unconstitutional (403 U.S. at 671, footnote 2). Similarly, it is difficult to see how, in the light of *Epperson*, government can finance schools which impose religious restrictions on what or how the faculty may teach.

D. The Test of Time and Place

In *Walz* both the Court's opinion by the Chief Justice (397 U.S. at 675-678) and the concurring opinion of Mr. Justice Brennan (at 681-688) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of its constitutionality.

In the present case, however, history and practice point in the opposite direction. In respect to the three challenged parts of the Act herein, whatever history there is establishes constitutional unacceptability rather than the reverse. While most of the relevant cases were decided before the Court held in *Everson* that the restrictions of the Establishment Clause were applicable to the States and therefore were based on state constitutional provisions forbidding tax-support for religious schools, Mr. Justice Brennan pointed out in his concurring-dissenting opinion in *Lemon-DiCenso-Tilton* that the Establishment Clause and these provisions are all part of the same uniform and long-standing constitutional tradition and history (403 U.S. at 645-650).

II.

Whether measured by *Everson*, *Schempp* or *Walz*, each of the three challenged parts of the Act violates the Establishment Clause.

A. *Maintenance, Repair and Physical Operations*

1. The Provisions of Section 1

Section 1 of the Act provides for grants of money directly to nonpublic schools for "maintenance and repair" if the nonpublic school has been designated during a base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C.A. §425). If the school qualifies under the Federal standards, it is to be given a direct grant of \$30 per pupil in attendance, which is increased to \$40 per pupil to those schools which are more than twenty-five years old. The grants are stated to be in reimbursement of "maintenance and repair" costs incurred in the preceding year. "Maintenance and repair" is defined as "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner [the State Commissioner of Education] may deem necessary to ensure the health, welfare and safety of enrolled pupils." Each qualifying school which seeks an apportionment is required to submit to the Commissioner an application which shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year. The per pupil annual allowance may not exceed

50% of the average per pupil cost of equivalent maintenance and repair in the public schools, and the total allotted to a nonpublic school may not exceed the amount expended for maintenance and repair in that school's base year. (JS 48a-49a)

2. Subsidization

It is hardly open to question that an unrestricted per pupil grant of tax-raised funds to religious schools would violate the Establishment Clause. The sole basis therefore upon which the appellees-appellants contend and can contend for constitutionality in the present case is that the grants are purportedly earmarked to pay for maintenance and repair costs. We believe that this reliance is completely unfounded.

It is true, of course, that in *Everson* the Court upheld the constitutionality of a statute appropriating public funds for transportation to religious schools, and in *Allen* it held the same in respect to a statute authorizing the loan of secular textbooks to pupils in such schools. But in *Everson* the Court was careful to point out that the statute there approached "the verge of [constitutional] power" (330 U.S. at 16); and in *Lemon* the Court indicated that it was not prepared to go any further than permitted by these decisions, namely, "[b]us transportation, school lunches, public health services, and secular textbooks supplied in common to all students * * *" (403 U.S. at 616-617).

The open-ended definition of "maintenance and repair" ("and such other items as the commissioner may deem necessary to insure the health, welfare and safety of enrolled pupils") encompasses practically everything in a school's budget other than teachers' salaries. (*Lemon-*

DiCenso foreclosed including that item.) It is significant and quite correct that in the Jurisdictional Statement of the appellees-appellants State of New York (p. 6) the "Questions Presented" describes the grants under Section 1 as being for "maintenance, repair and physical operation." Can *Everson* or anything else this Court has said in any case be interpreted as allowing government to subsidize the physical operations of religious schools? Is that not precisely what the appellees-appellants are asking the Court to do?

Section 1 of the Act allows a grant to a nonpublic school of a sum equalling the total of its expenditures for maintenance, repairs and operations so long as that amount does not exceed 50% of the state-wide average of public school expenditures for those purposes (Article 12, §551(1), JS 49a). It is not impossible that by reason of efficient management or geographic and other factors the total amount expended in a particular religious school for these purposes will not exceed 50% of the state-wide public school average. In such case, or in any case in which the amount received by a religious school exceeds that necessary to cover the operation costs of the secular aspects of instruction, would not the state be subsidizing in whole or in part sectarian instruction and religious worship, assuming that in any case they could be severed from the secular aspects of the school's operations? Is it conceivable that *Everson* allows this?

We do not wish to extend this brief by lengthy quotations from the District Court's opinion, but we believe the following is especially cogent and relevant to the *Everson* aspect of Section 1 and therefore set it forth here:

The argument is made, however, that since janitorial functions and snow removal obviously are not the teaching of religion, their neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury. The argument is bottomed on the assumption that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction. Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion. If it be argued that the subsidy would go only to the needy parochial school which has no surplus to apportion, the short answer is, of course, that such a parochial school would have more than it has now, for it does now pay from its present budget for janitor services and heat.

The vice, moreover, is not only that the school budget as such is indivisible, but that no effort is made in this part of the statute to distinguish between secular and religious education. The janitorial service embraces cleaning the chapel, where there is one, and heat is provided in the classrooms where religion is taught. There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom. *Cf. Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948). (JS 21a-22a)

We do not see how the unconstitutionality of the statute can be avoided by calling it one for "Health and Safety

Grants for Nonpublic School Children." In the first place, although the State does require that nonpublic schools providing instruction for children be safe and sanitary, that fact does not mean that the Establishment Clause permits the State to finance the maintenance, repair and operations of such schools. Moreover, children do not attend only church schools; they attend also churches and Sunday schools, and these too must be safe and sanitary. Does this mean that the State can constitutionally repair and provide coal and oil for churches and Sunday schools? Finally, suppose it is found that a particular nonpublic school is beyond repair. Can the State finance the construction of a new safe and sanitary building in which religion is taught and practiced? *Tilton* states clearly that it may not.

For the same reasons, we do not see how it is constitutionally significant that the qualifying schools must be located in low income areas. The Constitution of the United States extends to these no less than to other areas. It forbids tax supported maintenance and repairs of church schools in these areas no less than churches located there. We know of no decision of any court, state or Federal, which has ruled to the contrary.

3. Purpose and Effect

What we have said concerning subsidization is equally applicable to purpose-effect. As was noted in *Lemon* (403 U.S. at 621):

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related schools. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided

to the student and his parents—not to the church-related school. * * *

In *Allen*, the Court after finding that there was no subsidization within the *Everson* concept, considered and upheld the challenged statute under the purpose-effect test. It stressed that the books loaned to the pupils were completely secular and thus the statute did not advance religion. In the present case, as we have seen, the funds received from the State may permissibly be used to finance the operations of even those parts of the church school premises as are used exclusively for sectarian instruction or religious worship, as, for example, the school chapel. Under any interpretation of the purpose-effect test, this certainly constitutes advancement of religion.

In *Lemon*, the Court emphasized that under the Establishment Clause a State may not allow its funds to be used in whole or in part to aid the teaching of religion. The Court said (at 619):

* * * The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

Section 1 of the Act challenged here contains no such safeguards, and for that reason alone must be adjudged unconstitutional.

4. Entanglement

However, even if the State should change its procedures and read into the Act a provision that none of the granted funds be used to finance the operations of a school to the extent that it engages in sectarian instruction or religious worship, the statute would still be unconstitutional, for it would then propel the State into excessive entanglement with religion. It would require of the State that "comprehensive, discriminating and continuing state surveillance" which *Lemon-DiCenso* held to be constitutionally impermissible (*ibid.*).

The plurality opinion in *Tilton* distinguished *Lemon-DiCenso* on two grounds: First, *Tilton* involved colleges, while *Lemon-DiCenso* involved elementary and secondary schools. Second, the *Tilton* statute authorized a one-time single purpose grant, while *Lemon-DiCenso* authorized continuing financial relationships.

In respect to the first ground, the Court said (at 687):

Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and

religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspection that States impose over all private schools within the reach of compulsory education laws.

In respect to the second, the Court said (at 688):

Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact.

Neither of these two distinguishing factors is present in Chapter 414. The beneficiaries of the Act are not colleges but elementary and secondary schools, and the financing and the auditing takes place annually rather than only once for all time. Absent these two distinguishing factors, it is clear that the Act falls within the strictures of *Lemon-DiCenso*.

But most important is the Court's disposition of the twenty-year limitation in the Federal statute. All the Justices agreed that buildings financed with tax-raised funds could never—not even after twenty years—be used for sectarian instruction or religious worship. In the present case, the statute on its face permits such use at all times, even within a day after the state grant is received. We cannot

see how such a law can stand under the Supreme Court's decisions in *Lemon-DiCenso* and *Tilton*.

Finally, we note that even in *Tilton*, Mr. Justice White, whose vote made up the majority upholding the statute on its face, was careful to state that the statute would be unconstitutional even if no sectarian instruction or religious worship took place in the publicly financed facilities if "any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith" (403 U.S. at 671). In the present case, as we have noted, it is conceded that the statute applies equally to schools which do exactly that.

5. Time and Place

In considering the inference of constitutionality or unconstitutionality from the acceptance or non-acceptance in time and place, we suggest that it is significant that Section 1 of the Act is in direct and literal violation of Article XI, Section 3 of the New York State constitution, which expressly forbids the use of tax-raised funds "in aid or maintenance" of sectarian schools.

In the numerous reported decisions interpreting and applying the state constitutional provisions, our research has failed to disclose a single decision upholding the use of tax-raised funds to maintain or repair sectarian schools. Every decision we have read simply forbids state subsidization of the maintenance or operation of sectarian schools without the slightest indication that subsidization of repairs, fuel costs or janitorial services is not within the prohibition.⁸

⁸ The literature on the subject is voluminous. See, *inter alia*, A. Johnson and F. Yost, *Separation of Church and State in the*

6. Summary of Argument on Section 1

We again borrow from the opinion of Judge Gurfein to summarize our argument in respect to Section 1:

To summarize our reluctant conclusion that we cannot sustain a direct public subsidy for the "maintenance and repair of religious schools" under the guidelines of the Supreme Court, our points of departure with the argument of the State of New York are that: (1) "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson, supra*, 330 U.S. at 16 (emphasis added). We think *Tilton* does not overrule the application of the dictum to the case at bar. (2) The statute involved, though concentrating on schools in deprived areas, makes no distinction between secular and religious teaching, and tax-raised funds are directly used for the maintenance of buildings which teach religion. (3) We cannot accept the view that, under present doctrine, budgets for churches, synagogues or parochial schools can be made divisible by ascribing a percentage of cost to neutral functions. (4) On the contrary, we interpret the dictum of the Supreme Court that neutral services may be afforded to parochial schools to mean simply that general services, such as transportation, secular books, free lunches and,

United States (1948); W. Torpey, *Judicial Doctrines of Religious Rights in America* (1948); L. Pfeffer, *Church, State and Freedom* (Rev. Ed. 1967); C. Antieu, P. Carroll and T. Burke, *Religion Under the State Constitutions* (1965); C. Zollman, *American Church Law* (1933); Note, "Catholic Schools and Public Money," 50 *Yale L.J.* 917 (1941); R. Gabel, *Public Funds for Church and Private Schools* (1937).

perhaps, athletic training, visiting nurses and the like, afforded to students in *all* schools may also be made available to students in parochial schools. (5) We think that, unlike the one-time construction of new buildings as in *Tilton*, the "maintenance and repair" provisions of the New York statute involve "continuing financial" and political "relationships [and] dependencies." *Tilton, supra*, 403 U.S. at 688.

In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both (JS 24a-26a).

B. Tuition Grants

1. The Provisions of Section 2

Section 2 of the Act provides for flat tuition grants from the State Treasury to parents with family incomes of less than \$5,000 per annum who have children attending elementary or secondary nonpublic schools. The grant is in the sum of \$50 a year for children in grades 1 through 8, and \$100 in grades 9 through 12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent. The Commissioner is given "responsibility for the administration of the program" and is given authority to "promulgate such regulations as are necessary to carry out the provisions of this article." This section is entitled "Elementary and Secondary Education Opportunity Program."

2. Subsidization

It is, of course, incontestable that a direct per-pupil grant of tax-raised funds to church schools would constitute subsidization impermissible under the Establishment Clause. Nor can it be doubted that the result would be the same if the amount of the grant were equal to or less than that proportion of the education costs as is allocable to instruction in secular subjects; whatever doubts may have existed on that score were put to rest by *Lemon-DiCenso* and by *Tilton*. Hence, it is not constitutionally significant that Section 2 limits reimbursement to half the tuition paid, and that the legislature could have found that on the average at least 50% of education costs in church schools are allocable to secular instruction. (In *Tilton*, the Court held that governmentally financed facilities could not be used for sectarian instruction or religious worship even though the Federal grants were limited to 50% of the construction cost.)

The only conceivable constitutional justification for Section 2, therefore, must lie in the fact that the subsidization is not to the schools directly but to the parents in the form of reimbursement for tuition paid. Initially, we suggest that it is not constitutionally material that the payments are made to the parents in reimbursement for tuition already paid rather than in advance for tuition to be paid. In the first place, the payments to parents in *Everson* were in the form of reimbursement for transit fares already paid^o and none of the Justices suggested that this had any constitutional significance. Secondly, the salary supplements invalidated in *DiCenso* were paid to teachers for services

^o 330 U.S. at 3.

already rendered, and again there was no indication in any of the opinions in that case that this had constitutional significance. Finally, although the parent receives his grant after he has paid the tuition, the receipt is conditioned upon his having made the payment, and we do not think that the First Amendment distinguishes between conditions precedent and subsequent.

Three different United States District Courts have considered and passed on, almost simultaneously, the constitutionality of tuition grants for church school attendance—the present case, *Lemon v. Sloan* in the Eastern District of Pennsylvania (probable jurisdiction noted, October Term, 1972, No. 72-459), and *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio) which this Court affirmed earlier this Term without argument. — U.S. —, 93 S. Ct. 61. These decisions, arrived at in at least two of the instances independently of each other, were all unanimous. Thus, nine Court of Appeals and District Court judges have found tuition laws violative of the Establishment Clause and none has found to the contrary. In addition, all but one member of this Court but a few months ago determined that the case to the contrary is so lacking in merit as not to justify oral argument.

Moreover, the Federal courts have been equally unanimous in equating tuitions and subsidies in the Equal Protection context of racial segregation, as Mr. Justice Douglas noted in his concurring-dissenting opinion in *Lemon-DiCenso-Tilton*.¹⁰ The thrust of these decisions is summed

¹⁰ 403 U.S. at 633, footnote 17. The cases cited are: *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La.), aff'd 368 U.S. 515 (1962); *Lee v. Macon County Bd.*,

up as follows in *Griffin v. State Board of Education*, 239 F. Supp. 560, 563 (E.D. Va. 1965):

[W]e think the State cannot ignore any plain misuse to which a grant has been or is intended to be put. *Nor do we think weight is to be accorded the fact that the money is paid to the pupil or parent and not to the school, for the pupil or parent is a mere channel . . .* These premises of decision have especial significance here because the issue is the right of the State or locality to make, and not the right of pupils, parents or schools to take, the grants. (Citation omitted. Emphasis supplied.)

It is no answer that these cases concern racial exclusion whereas the statute challenged herein involves religious exclusion. Where governmental subsidization is the issue, the four members of this Court who, going out of their way, commented on the question could find no constitutional distinction between them.¹¹ The reason for this is that the question is not the right of private institutions to exclude on the basis of religion or race, but the constitutional power of government to subsidize their operations, and as to this Establishment is no less a constitutional concern than is

267 F. Supp. 458 (M.D. Al.), aff'd sub nom. *Wallace v. United States*, 389 U.S. 215 (1967); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La.), aff'd 389 U.S. 571 (1967); *Brown v. South Carolina State Bd.*, 296 F. Supp. 199, aff'd 393 U.S. 222 (1968); *Coffey v. State Educ. Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Lee v. Macon County Bd.*, 231 F. Supp. 743 (M.D. Al.).

¹¹ Mr. Justice Douglas and Mr. Justice Black (concurring with him), note 10 *supra*; Mr. Justice Brennan, concurring and dissenting in *Lemon-DiCenso-Tilton*, 403 U.S. at 644, footnote 1; Mr. Justice White, at 671, footnote 2.

Equal Protection. If tuition grants are subsidization under the latter Clause they are not less than that under the former.

The crux of the matter is that, whether characterized as "conduit," "channel" or other synonym, tuition grants have no meaning except as a "transfer [of] part of [government] revenue" (*Walz*, 397 U.S. at 675). This is no less true in respect to religious schools than racial schools, and is equally unconstitutional in both.

3. Purpose and Effect

Section 2 of the Act omits any provision that no part of the tuition grant shall be used to pay for sectarian instruction or religious worship. Tuition bills and receipts used in religious schools do not generally set forth separately the amounts allocable to religious and secular studies, and in any event the statute does not require a separate statement. There is therefore no assurance that at least part of the grant will not be used for that purpose. As in respect to Section 1, it cannot be assumed that in all cases no more than 50% of the tuition will be used for sectarian instruction and religious worship. What Section 2 therefore authorizes is the use of government granted funds to advance religion.

On this point, *Tilton* is conclusive. There the Court held that the provision permitting use after 20 years of a facility half of the cost of which was financed by the Federal Government, violated the purpose-effect test since it was "inadequate to insure that the impact of the federal aid will not advance religion" (403 U.S. at 682). The Court said (at 683):

Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

That the amount of each tuition bill allocable to religion may by itself be small (although in the aggregate it could be relatively as substantial as half the value of the use of a facility after 20 years) is not constitutionally significant. The monetary value of the use of a public school classroom to recite a 22-word prayer or a few verses from the Bible is obviously very small, but that fact did not render a law permitting it immune to successful challenge under the Establishment Clause in *Engel v. Vitale*, 370 U.S. 421 (1962) and *Schempp, supra*. In *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923), the Court rejected a taxpayer's suit against the Federal Government on the ground that "his interest in the moneys of the Treasury—partly realized from tuition and partly from other sources—is shared with millions of others; it is comparatively minute and indeterminable" But in *Flast v. Cohen*, 392 U.S. 83 (1968), the Court, quoting (at 103) from Madison's Memorial and Remonstrance that "the same authority which can force a citizen to contribute three pence only of his

property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever," held that a taxpayer did have standing to challenge a Federal grant of funds that could be used for sectarian instruction or religious worship.

4. Entanglement

The absence from Section 2 of any provision adequate to insure that the State aid will not advance religion renders it unconstitutional under the purpose-effect test. However, even if the statute did so provide or the Commissioner would issue regulations requiring separate tuition bills and receipts for secular and sectarian instruction and limit the payments to the amounts set forth in the former, the law as applied would still be unconstitutional. The reason for this is that in seeking to avoid the Scylla of advancement the State would be engulfed in the Charybdis of entanglement.

We do not believe it necessary to expand on this point. Everything the Court said in *Lemon-DiCenso* is equally applicable here. Particularly relevant, and indeed by itself determinative here, is the holding in *Lemon* that the Pennsylvania statute involved the State in unconstitutional entanglement because "schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of secular as distinguished from the religious instruction" (403 U.S. at 621).

5. Time and Place

It should not be assumed that tuition grant statutes are a new device recently fashioned to evade constitutional prohibitions, state and Federal, against tax-financing of sec-

tarian schools.¹² As long ago as 1938, the New York Court of Appeals could say:

• • • The courts of this country have been unanimous in prohibiting the use of public funds to pay directly or indirectly, tuition fees of pupils in private or sectarian schools. *Judd v. Board of Education*, 278 N.Y. 200, 215. Overruled on other grounds in *Board of Education v. Allen*, 20 N.Y.2d 109.

Our research has failed to disclose any decision, state or Federal, which has upheld the constitutionality of a law for grants to pay for tuition to church schools. The decisions to the contrary are legion. Among them we cite only the following: *Williams v. Board of Trustees*, 173 Ky. 708 (1917); *Opinion of the Justices*, 259 N.E.2d 564 (Mass. Sup. Jud. Ct., 1970); *Almond v. Day*, 197 Va. 419, 89 S.E.2d 851 (1955); *Swart v. South Burlington School District*, 122 Vt. 177, 167 A.2d 514, *cert. den.*, 366 U.S. 925 (1961); *Hartness v. Patterson*, 179 S.E.2d 907 (S. Car. 1971).

None of the cases, Federal or state is distinguishable on the ground that the statute there invalidated applied to all parents whereas in the present case the statute is purportedly limited to parents with incomes which do not exceed \$5,000. This, of course, is in reality not so. The tuition grant section is indeed so limited but that section is only part of the statute. Parents with incomes exceeding \$5,000 are covered in Sections 3, 4 and 5 which provide for tax credits. The statute is a single package with a single purpose—to aid religious schools by financing tuition payments to them, and as we will seek to show in the next part of this

¹² Or, as we have seen, racially segregated schools. See cases cited *supra* note 10.

brief, as far as the Constitution is concerned there is no difference between the methods which the ingenuity of determined legislators creates.

However, even if we consider the tuition grants section *in vacuo*, the attempted distinction is unpersuasive. There is probably not a single statute invalidated by this Court in *Lemon*, *DiCenso*, and *Sanders v. Johnson*, 403 U.S. 955 (1971) and uniformly by the District Courts which does not contain a legislative finding that unless the aid provided for in the statute is given the parents will be unable to send their children to the nonpublic schools. Nor is there probably any brief or oral argument made in these cases in which this argument was not forcefully made by both counsel for the states and for intervening parents.

As of the present, no court has been persuaded. Indeed, in *Lemon v. Sloan* the District Court turned the argument around and used it to emphasize the unconstitutionality of the law, saying:

Second, we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional. Parents are eligible to receive payments under the Act because they have paid tuition at a nonpublic school. Tuitions are the "very life blood" of private educational institutions, *Almond v. Day*, 197 Va. 419, 427, 89 S.E.2d 851, 857 (1955), because they are the source from which many educational services, secular as well as religious, are funded. If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are

unable to pay these costs, the schools will be forced to close. It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools (Jurisdictional Statement in *Sloan v. Lemon*, 72-620, pp. 13a-14a).

C. Tax Credits

1. The Provisions of Sections 3, 4 and 5

We have summarized the provisions of Sections 3, 4 and 5 of the Act in our Statement of the case (*supra*, pp. 5-6). Here we emphasize that while the statute speaks in terms "deductions," "subtract[ions]," "exclusions" and "modification" (JS 53a), it is obvious that what is intended is not the usual deduction but a tax credit, i.e., a reduction in the amount owed to the State by the taxpayer computed after all deductions from his gross income have been taken, including the standard deduction allowed to taxpayers who do not itemize their contributions.

Chapter 414 is not a tax deduction statute. Contributions to church schools are already deductible under New York law, and Chapter 414 specifically provides that the benefits are available even if the taxpayer elects not to itemize his

contributions. Moreover, and most important, in deductions the amount excluded from reportable income is the amount of the contribution; Chapter 414 does not measure the exclusion by the amount of tuition paid by the taxpayer but by the amount of his gross income and the number of children he has in school. There is a great difference between a deduction of \$150 from the reportable income of a man with three children attending a nonpublic school and a deduction of \$3,000, which is what Chapter 414 authorizes. What the State has done in Chapter 414 is simply to figure out for each eligible taxpayer what he has to deduct in his tax return in order to effectuate the tax credit intended by the legislature.

This was recognized not only in Judge Hays' partial dissent (JS 44a), but also in Judge Gurfein's majority opinion. He opens this part of his opinion with the statement that "The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stand in different case" (JS 32a). Elsewhere in his opinion he states unqualifiedly that the statutory benefit "is in effect a tax credit since the exemption is not intended to equal the parents' outlay" (JS 352. Emphasis in original).

We also call the Court's attention to the "Question Presented" in the Motion to Affirm of appellee Senator Earl W. Brydges, the legislative leader of the measure, in No. 72-694:

The Question presented in this appeal is the constitutionality under the First Amendment of Sections 3, 4 and 5 of Chapter 414 of 1972 Laws of New York State, which provide tax credits for tuition paid by parents for their children enrolled in nonpublic schools. (P. 2. Emphasis added.)

On December 29, 1972, the United States District Court for the Southern District of Ohio (Eastern Division) in the case of *Kosydar v. Wolman* issued a unanimous decision that the State's law providing tax credits for tuition paid to church schools violates the Establishment Clause. The Court's opinion is a comprehensive and in-depth analysis of the constitutional issues and the relevant precedents, and we respectfully commend it to this Court's attention. The position expressed in that opinion is that deductions and credits for tuition are, like grants, equally unconstitutional. (Text accompanying footnote 10. The pages in the slip opinion available to us are unnumbered.) Professor Paul Freund is of the same view. "A deduction or credit for expenses of nonpublic school attendance," he states, "would not in my judgment stand on a surer ground than grants to pupils for that purpose" (Legal and Constitutional Problems of Public Support for Nonpublic Schools, Submitted to the President's Commission on School Finance, p. 99).

The Court need not reach this question in the present case. A decision can be deferred until such time as a case is brought before the Court which involves a bona fide deduction from gross reportable income of amounts paid for tuition to church schools. Here, we submit, the Court should treat Chapter 414 as the District Court did, namely the functional and constitutional equivalent of the undisguised tax credit law struck down in *Kosydar v. Wolman*.

2. Subsidization

There may be some differences between tuition grants and tax credits, but we do not believe they rise to constitutional dimensions. Hence, should the Court decide that Section 2 of the Act does not violate the Establishment

Clause, we are unable to see how it could hold otherwise in respect to Sections 3, 4 and 5. We are frank to admit that this is a concession which concedes very little; for if tuition grants are upheld, few legislatures will resort to the devious route of credits. The tax credit law invalidated in *Kosydar* was enacted because Ohio's tuition grant law had already been held unconstitutional in *Wolman v. Essex*.

This equation, however, works both ways; if tuition grants constitute impermissible subsidization so too do tax credits. The fact that the subsidization is effected by a tax statute does not render it beyond Establishment restrictions. Concededly, legislatures have wide discretion in allowing deductions, credits and exemptions, but *Walz* establishes that it must be exercised within the confines of the First Amendment. (Cf. also *Speiser v. Randall*, 357 U.S. 513 (1958); *First Unitarian Church of Los Angeles v. County of Los Angeles*, 357 U.S. 545 (1958)).

In *Walz*, the Court refused to equate tax exemption with subsidization because in the former "government does not transfer part of its revenue to churches" (397 U.S. at 675). But if, as we believe, credits are not distinguishable, realistically or constitutionally, from tuition grants, and if, as we have sought to show in respect to Section 2 of the Act, the latter are a form of subsidization, then credits unlike exemptions do transfer part of government revenue to church schools.

We are unable to discern any difference, in law or fact, between a situation in which a person sends to the State a check for the amount he owes on his tax return and independently thereof sends the State his tuition receipt and gets back a check for all or part of the amount shown

thereon, and the situation in which he computes his tax liability as in the first case but instead of sending the State a check for that amount sends in his tuition receipt. Two persons with the same income and the same allowable deductions owe the same amount to the State; one has no children attending church schools and he sends the State a check for the amount he owes. The other sends a receipt from the church school attended by his children. How can it be said that the State has not paid the tuition for him?

In *Walz*, the Court noted that churches receiving tax exemption for their property are treated exactly as other nonprofit institutions, such as libraries, art galleries, or hospitals and that it could not be contended that the exemption accorded to them constitutes a subsidization. But the tax benefit enjoyed by these institutions would be the same as those granted by Chapter 414 only if the patron of an art gallery could send to the State in payment of his tax liability a receipted bill for his dues or a patient could do the same with his hospital bill.

Chapter 414 on its face shows the unreality of any attempted distinction between credits and grants. Sections 3, 4 and 5 accord credits to parents with incomes of \$5,000 and over. But few parents with incomes of less than \$5,000 pay New York State income taxes so that credits would be of no avail to them. Accordingly, they are given instead tuition grants to achieve the same purpose. It is no coincidence that, as is evident from the table of estimated net benefits set forth in note 3, *supra*, tax benefits begin just about where tuition benefits stop, i.e., about \$50 per child.

This Court has found no constitutional difference between tuition grants and tax credits in an Equal Protection con-

text. (*Griffin v. County School Board*, 377 U.S. 218, 223 (1964)). For the reasons we have already stated (*supra*, pp. 33-34), we suggest that this is equally true in an Establishment context.

3. Purpose and Effect

In view of our position that credits and tuition grants are constitutionally indistinguishable, what we have said in respect to the latter under the purpose-effect test (*supra*, pp. 35-37) is applicable here and need not be repeated.

4. Entanglement

Here, again, what we have said about entanglement in respect to tuition grants (*supra*, p. 37) is equally applicable here. One aspect of this test which, as will be seen shortly, is particularly appropriate here, has not been discussed and merits serious consideration.

Initially, we note that in New York (and this is substantially the case in most other States) all but 6.5% of the nonpublic schools are religious schools, and of the 6.5%, some are profit schools and hence not within the coverage of Sections 3, 4 and 5. ("The Collapse of Nonpublic Education: Rumor or Reality?" Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary Education, Vol. 1, p. I-6.) Of the nonpublic school students, 84.5% are Catholic. (*Ibid.*, p. I-5.) With this factual background, we quote the following from *Lemon-DiCenso* (403 U.S. 622-623. Citations omitted):

A broader base of entanglement of yet a different character is presented by the divisive political poten-

tial of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. *Walz v. Tax Commission*. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and

problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

Of course, as the Court noted in *Walz*, "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." We could not expect otherwise, for religious values pervade the fabric of our national life. But in *Walz* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

We have set forth this extensive quotation because the following story which appeared in the *New York Times* of August 7, 1972 presents almost a casebook illustration of its validity and relevance:

The Nixon Administration and the Democratic party—the latter in the person of Representative Wilbur D. Mills—are vying for the Roman Catholic vote with a plan for a new form of tax assistance to parochial schools.

Less openly, the two sides may also be competing to attract some Southern segregationist votes with the same tax-aid plan, which would apply to all private pri-

mary and secondary schools, not just to those with religious affiliation.

The legislation was originally devised by a Catholic member of Congress, Representative Hugh L. Carey, Democrat of Brooklyn. It is being sponsored by Mr. Mills, an Arkansas Democrat, who has a long record of opposition to tax credits on principle. The measure has also been endorsed by the Nixon Administration, though it opposed similar proposals in the previous years.

• • • • •

Mr. Carey, in discussing his bill, speaks frankly of the political, as well as the substantive, merits that he sees in it.

He said that he had no trouble in gaining Mr. Mills' support for the measure "once the chairman went national"—that is, once Mr. Mills, the chairman of the House Ways and Means Committee, decided to make a bid for the Democratic Presidential or Vice-Presidential nomination.

With Mr. Mills's hope for a place on the ticket now dashed, his main political aim in scheduling hearings next week on the Carey-Mills bill, Mr. Carey thinks, is to blunt the President's appeal to the Catholic, the elderly and other interest groups. • • •

5. Time and Place

As we have noted (*supra*, p. 20), the Court in *Wale* relied heavily on the longevity and ubiquity of tax exemptions as indicative of constitutionality. But Chapter 414 is not a tax-exemption statute. The property of church schools is already tax exempt under New York Real Property Tax Law §420(1), and Chapter 414 adds nothing to that.

Tax credits, however, are a recent innovation, going back no further than *Brown v. Board of Education*, 347 U.S. 483, in 1954. It owes its existence, both to the *Brown* and present context, to the ingenuity of lawyers seeking to open new avenues through constitutional barriers as promptly as old ones are closed by the courts. In both the *Brown* and present context, these efforts have heretofore proved almost uniformly unsuccessful. We urge the Court not to allow it to become successful now.

III.

Sections 3, 4 and 5 are inseverable from Section 2 and cannot stand alone.

With practically no discussion, other than a citation of *Tilton and Champlin Refining Co. v. Corporation Commission*, 286 U.S. 200, 234 (1932), the District Court held that Sections 3, 4 and 5 of the Act are separable from Sections 1 and 2. We respectfully suggest that Judge Hays' response is far more persuasive. He states (JS, pp. 45a-46a):

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.

As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature would not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly

invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). It is obvious that the New York state legislature would not have enacted section 3 benefiting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

We add only that holding Sections 3, 4 and 5 inseverable from Section 2 (and Section 1) does not make the severability clause superfluous. It serves the important and we submit intended purpose of preserving parts 4 and 5 of the Act, the need for which is obviously predicated on the invalidation rather than the upholding of the other parts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed in respect to Sections 1 and 2 of Chapter 414 and reversed in respect to Sections 3, 4 and 5 thereof.

Respectfully submitted,

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MELVIN L. WULF

BURT NEUBORNE

Of Counsel

February, 1973



IN THE
Supreme Court of the United States

October Term, 1972

Nos. 72-694, 72-753, 72-791, 72-929

MAR 1 1973

MICHAEL RODAK, JR.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellants,

v.

EWALD B. NYQUIST *etc. et al.*,
Appellees;

WARREN M. ANDERSON, as Majority Leader and President pro tem
of the New York State Senate,
Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees;

EWALD B. NYQUIST *etc. et al.*,
Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees;

PRISCILLA L. CHERRY *et al.*,
Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MEMORANDUM IN OPPOSITION to MOTION of SIDNEY A.
SEEGBERS *et al.* FOR LEAVE TO FILE BRIEF
AMICI CURIAE**

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IN THE

Supreme Court of the United States

October Term, 1972

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MEMORANDUM IN OPPOSITION to MOTION of SIDNEY A.
SEEGER *et al.* FOR LEAVE TO FILE BRIEF
AMICI CURIAE**

Appellants Cherry, Ferguson and Ruiz in appeal 72-929 and appellees Boylan, Ducey, Ferrarella and Roos in appeal 72-694 received in the mail on February 23, 1973 the Motion of Sidney A. Seegers *et al.* for leave to file an *amicus* brief in the above appeals. This motion is opposed pursuant to Rule 42(3) of the Rules of this Court for the following reasons:

1. The New York statute under review by this Court in the above appeals is *sui generis*, differing in a number of material respects from the Louisiana legislation referred to by applicants.

2. The motion for leave to file appears to be merely an effort on the part of the applicants to influence the outcome of the litigation allegedly now pending in the United States District Court for the Middle District of Louisiana.

3. The position of, and arguments proposed by, applicants are already represented by Leo Pfeffer, Esq., counsel for the Committee for Public Education & Religious Liberty *et al.*

4. The motion for leave to file does not conform with the specific requirements of Rule 42(3) of the Rules of this Court.

Dated: February 26, 1973

Respectfully submitted,

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FILE COPY

FILED

MAR 2 1972

MICHAEL BROWN, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
ET AL., *Appellants*

— against —

EWALD B. NYQUIST, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

BRIEF OF THE BAPTIST JOINT
COMMITTEE ON PUBLIC AFFAIRS
AS AMICUS CURIAE

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3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
ET AL., *Appellants*

— *against* —

EWALD B. NYQUIST, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

BRIEF OF THE BAPTIST JOINT
COMMITTEE ON PUBLIC AFFAIRS
AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: the American Baptist Churches in the U.S.A., the Baptist General

Conference, the National Baptist Convention of America, the National Baptist Convention, U.S.A., Inc., the North American Baptist General Conference, the Progressive National Baptist Convention, Inc., the Seventh Day Baptist General Conference, and the Southern Baptist Convention. These Baptist groups have some 23 million members who evidence a direct interest in church-state relations. The Joint Committee has as one of its mandates the obligation to respond "... whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle. Religious liberty is also a fundamental legal right protected by the First and Fourteenth Amendments to the Constitution of the United States. It is the opinion of the Baptist Joint Committee on Public Affairs that the principle of religious liberty is jeopardized by the decision of the United States District Court for the Southern District of New York, dated October 2, 1972, which is on appeal in this case.

STATUTE INVOLVED

The statute involved in the case at bar is Chapter 414 of the New York Laws of 1972.

QUESTIONS PRESENTED

This *amicus* responds only to the technical question: Did the United States District Court for the Southern District of New York err in holding that Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 do not violate the Establishment Clause of the First Amendment of the United States Constitution? Less technically

the question may be stated: Does the Establishment Clause of the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, *prohibit* the state of New York from granting "... tax credit for tuition paid by parents to non-public schools. . . ." (majority opinion *Committee for Public Education and Religious Liberty, et al., v. Nyquist, et al.*, 72 Civ. 2286 DCSDNY, October 2, 1972 here on appeal) on the elementary and secondary level which are church-controlled and church-operated?

STATEMENT OF THE CASE

Chapter 414 of New York Laws, 1972 is the fourth of a series of laws passed by the state legislature over the past two years which have been challenged in the courts as violative of the Establishment Clause of the First Amendment to the Constitution of the United States.

Section 1 of Chapter 414 provided public funds to maintain and repair nonpublic elementary and secondary schools. Section 2 of Chapter 414 authorized a tuition reimbursement to parents of children enrolled in nonpublic elementary and secondary schools if those parents had a New York taxable income of under five thousand dollars per year. These two Sections were unanimously declared violative of the Establishment Clause in the case here on appeal.

Sections 6-10 deal with aspects of aid to public education and are not in controversy in the pending case. Section 11 is the severability clause which is in controversy in this case. However, this raises a technical legal question to which this *amicus* does not choose to respond.

The United States District Court for the Southern District of New York, in the case here on appeal, on October 2, 1972 held in a 2-1 decision that Sections 3, 4 and 5 of Chapter 414 are not violative of the Establishment Clause.

Sections 3, 4 and 5 provide that an individual shall be entitled to subtract, for state income tax purposes, from his federal adjusted gross income an amount shown in a table¹ for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent. This process is titled in the New York tax law as amended, "Modification for non-public school tuition" [§ 612(j)]. It is this progressive tax credit and the rationale which underlies it which has been challenged under the Establishment Clause in the case now at bar.

1

<i>If Adjusted Gross Income is</i>	<i>Income Exclusion Per Pupil is</i>	<i>Estimated Net Benefit to Family One child</i>	<i>Two children</i>	<i>Three or more</i>
Less than \$9,000	\$1,000	\$50.00	\$100.00	\$150.00
\$9,000 — 10,999	850	42.50	85.00	127.50
11,000 — 12,999	700	42.00	84.00	126.00
13,000 — 14,999	550	38.50	77.00	115.50
15,000 — 16,999	400	32.00	64.00	96.00
17,000 — 18,999	250	22.50	45.00	67.50
19,000 — 20,999	150	15.00	30.00	45.00
21,000 — 22,999	125	13.75	27.50	41.25
23,000 — 24,999	100	12.00	24.00	36.00
25,000 and over	0	0	0	0

SUMMARY OF ARGUMENT

The argument below may briefly be summarized as follows:

1. Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 reflect a legislative purpose directed at providing public aid to religious parochial schools and, therefore, are inconsistent with the "primary purpose" test established by this Court.

2. The Establishment Clause requires governmental neutrality toward religion. Rather than achieving neutrality, the primary effect of Sections 3, 4 and 5 of Chapter 414 is to grant public aid to sectarian religion and its institutions.

3. Sections 3, 4 and 5 of Chapter 414 do not set up sufficient administrative controls to guarantee that the aid provided is used for secular purposes. Further, the sections excessively entangle government and religion politically.

4. The tax credit provided for in Sections 3, 4 and 5 of Chapter 414 and the religious character of the class of schools to which they are applicable constitute an unconstitutional public support by the government of the teaching of religion.

5. Sections 3, 4 and 5 of Chapter 414 offend the Establishment Clause by creating a form of compulsory religion.

ARGUMENT

Religious groups operate and control elementary and secondary schools—usually on a financially sacrificial basis—for religious reasons. As a result of *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abing-*

ton Township v. Schempp, 374 U.S. 203 (1963), a number of Protestant schools have been established so that parents might provide an education for their children which embodies prayer and Bible reading as an integral part of the school day. Long before these two decisions other church-operated and church-controlled elementary and secondary schools existed—and they continue to exist—in order to perpetuate a religious belief and to provide an educational milieu of which religion is an integral part.

In an article, "Why Catholic Schools?," Father Christopher O'Toole, C.S.C., stated:

The purpose of the parochial school is to permeate with the Faith and the spirit of the Gospels the total educative process. In a parochial school the teaching of religion, for example, is not simply just another subject to be learned and which is not taught in the public schools. No, the entire curriculum is to move forward in an atmosphere of faith in order to produce a pupil who knows, at least in an elementary way, how to relate all knowledge to its ultimate source—God himself. *National Catholic Register*, August 6, 1972.

The basic purpose of denominational education is to foster and maintain the teachings of a denominational religion. The religious aspect of the curriculum must be the principal and dominant reason for the existence of such schools. *Essex v. Wolman*, 409 U.S. 808 (1972).

The District Court for the Southern District of New York in its opinion on the case now at bar stated:

In the case at bar, we are dealing largely with the same parochial school system that was before this

Court in *Committee for Public Education and Religious Liberty v. Levitt and Nyquist*, 342 F. Supp. 439 (S. D. N. Y. April 27, 1972). The answers to interrogatories made there established that New York State construed as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7) There seems to be no dispute that the statute here is also intended to apply to such schools.

Because 93.5% of the students in nonpublic elementary and secondary schools in New York are enrolled in church-operated and church-controlled schools—more than 90% of which are Roman Catholic schools—it is submitted that the class created by Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 is overwhelmingly religious in composition. Due to the limited nature of the class created and to the predominance of one religious group within that class, the principal beneficiary of this statute must be organized religious activity.

1. Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 do not reflect a primary secular legislative purpose and, therefore, do not meet one of the tests of constitutionality set by this Court in *School District of Abington Township v. Schempp*, *supra*, at 222-223.

The difficulty of demonstrating that a legislative body has other than a secular legislative purpose when it passes acts dealing with education in church-operated and church-controlled elementary and secondary schools when a detailed, accurate record of all aspects of the legislative process is not kept is granted. It is further granted that, *generally*, legislative bodies, as coequal branches of government, have made their own determination on the issue of constitutionality of their acts and that the courts should *usually* assume *prima facie* constitutionality. However, Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 must be considered as an exception to the rule.

The New York legislature in Section 3 of Chapter 414 assumed the secular desirability of pluralism in education and maintained that nonpublic elementary and secondary schools perform a secular function by relieving the taxpayers of the state of the burden of providing public school education for those children enrolled therein [§ 3(3)]. Despite these stated secular purposes the facts in this particular case are such that one cannot logically accept a primarily secular purpose in the legislature's action.

Though the class of nonpublic elementary and secondary schools is defined to include most of the nonprofit schools in the state, the overwhelming preponderance of schools included in the class has been shown to be church-operated and church-controlled. Only these religious schools were active in encouraging the legislature to enact the contested legislation. They were most vocal in stating the essentiality of public financial aid^a to their continued viable existence. It is highly unlikely that the legislature would have considered a bill to grant financial aid to nonpublic schools if the class of schools so aided

had not included the 93.5% of those schools which are religious in their operation and control. It is doing the New York legislature no injustice to infer logically from the legislative records available that the main legislative purpose of Sections 3, 4 and 5 of Chapter 414 was to aid church-operated and church-controlled elementary and secondary schools.

Even if a nonsecular legislative purpose is not in the exact wording of Sections 3, 4 and 5 of Chapter 414, the religious press of New York was not in doubt about legislative intent. A reading of that press during the legislative action on Chapter 414 leaves no doubt that the legislation was fostered by and intended to aid religiously operated and controlled elementary and secondary schools.

It is a *non sequitur* to maintain that a secular legislative purpose is assured because public financial aid to nonpublic schools relieves taxpayers of the financial burden of providing public education to students now in nonpublic schools.

The short answer to the argument that sectarian schools benefit the general populace by reducing the expenditures needed to support the public schools is that our Constitution embodies values which override considerations of mere cost efficiencies or school savings. *Kosydar v. Wolman*, — F.2d — (S.D. Ohio, December 29, 1972).

We agree with the court in *Kosydar v. Wolman*, *id.*, that "... the Establishment Clause stands as a bar to aid of Church schools, even though social pluralism may be enhanced and tax dollars saved by virtue of these schools' existence." The New York legislature may have been correct when it assumed that Sections 3, 4 and 5 would help to achieve educational pluralism and, by giving some

public aid to nonpublic schools, would save taxpayers some money. However, because the class of schools it established to receive public aid is so decisively religious in character, because the total educational program of religious schools is permeated with the teaching of religion, and because the type of aid provided is tied to tuition actually paid to these schools, it cannot be assumed and we cannot accept that the primary purpose of New York's legislature was secular in this act.

If individuals, for reasons of personal religious belief, voluntarily undergo a financial handicap, foregoing available public facilities by sending their children to selected schools, the First Amendment stands as a bar to their being reimbursed by the state for their sacrifice. This principle is no less vital if, as a result of such sacrifices, the state achieves cultural diversity or derives economic benefit. *Essex v. Wolman, supra*.

2. Sections 3, 4 and 5 of Chapter 414 do not satisfy the "primary effect" test also enunciated in *Abington v. Schempp, supra*.

In his dissent on these three sections in the case now at bar, Circuit Judge Hays compared them to Sections 1 and 2 of Chapter 414 which the three judge court unanimously declared to be contrary to the Establishment Clause. "The purpose and effect . . . are the same . . ., i.e., to subsidize religious training for children." *Committee for Public Education and Religious Liberty, et al., v. Nyquist, et al., supra*

Supporters of appellees' position argue that Sections 3, 4 and 5 merely give a tax advantage to the parents of children in nonpublic schools and that the parents may spend the money they save in taxes for whatever they

want. This, they assert, satisfies the "primary effect" test. This position is entirely without merit.

The class of schools to which a taxpayer must pay tuition in order to claim a tax credit is overwhelmingly sectarian, the instruction in the sectarian schools is impregnated with sectarian religion, and the tax credit is based on tuition already paid. Parents of children in predominantly sectarian schools are rewarded by preferential tax treatment for the sole reason that they have paid tuition to a suspect class of nonpublic institutions. This can only have the primary effect of aiding religion. To claim that indirect aid is not aid is specious reasoning and is contrary to the holdings of this Court.

In *Essex v. Wolman*, *supra*, in dealing with an analogous attempt to aid religious schools, the three judge District Court for the Southern District of Ohio unanimously held—and was affirmed by this Court (409 U.S. 808, 1972)—that:

The state cannot claim it does not know what the parents will do with their grants, for the expressed intent of the statute is to "reimburse parents of non-public school children for a portion of the financial burden experienced by them" in sending their children to parochial schools. *It does not matter that the parents are subsequently free to use the money received for any purpose. The intent of the statute in providing the reimbursement must speak for itself.* [emphasis added].

We submit that the effect of Section 3(5) of Chapter 414 which states:

5. The legislature hereby finds and determines that similar modifications . . . should also be provided to

parents for tuition paid to nonpublic elementary and secondary schools . . .

is identical to the effect of the reimbursement device proscribed in *Essex v. Wolman*, *supra*.

“[I]t is the use to which public funds are put” and not to whom they are provided that is controlling. . . . *What may not be done directly may not be done indirectly lest the Establishment Clause becomes a mockery.* *Abington v. Schempp*, *supra*, at 230 (Douglas, J., concurring).

It is correct that this Court did permit aid to parents and students in *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 392 U.S. 236 (1968), but in these cases the class of students was broad and the aid provided—transportation and state-approved textbooks—was ideologically neutral. In the case at bar the opposite prevails. The class is predominantly sectarian and the aid—tuition assistance—is not ideologically neutral. The effect, therefore, is an affront to the Establishment Clause and cannot stand.

The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination. *Everson*, *supra*, at 24 (Jackson, J., dissenting).

3. Sections 3, 4 and 5 of Chapter 414 engender excessive entanglement of government and religion.

This Court enunciated the doctrine of excessive entanglement of government and religion in *Walz v. Tax Commission*, 397 U.S. at 674 (1970), to set some standards for constitutionally permissible church-state interactions under the Establishment Clause. The doctrine was elab-

orated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as was the distinction between administrative and political entanglement. Excessive administrative or political entanglement were established as bases for a determination of unconstitutionality. By affirming *Essex v. Wolman*, *supra*, this Court further delineated the doctrine.

In discussing Sections 3, 4 and 5 the majority in the case at bar stated:

In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support.

If it was the concern of the legislature in passing Sections 3, 4 and 5 that religious parochial schools not go under for lack of financial support, it follows that the legislature thought that the passing of this piece of legislation would provide, albeit indirectly, financial support to "religious parochial schools" to keep them from going under. Therefore, these Sections, by definition, provide public financial aid to religious parochial schools. It must be determined whether aid of this type results in excessive administrative entanglement.

Essex v. Wolman, *supra*, stated that the criteria for determining administrative entanglement as a result of aid given to religious schools are: (1) the use to which the aid is put, (2) the form in which the aid is provided, (3) the person or institutions to which the aid is directed, and (4) the extent to which the state must intervene to determine that the aid is spent for constitutionally secular purposes.

We have demonstrated that public aid was provided to religious schools (which overwhelmingly make up the class created by the legislature) and was tied to tuition actually paid to them.

Tuition forms the major part of a school's general fund and moneys derived from it can be used for any purpose it deems legitimate. Such funds may be used for the construction of a chapel as well as a gymnasium; for the purchase of religious icons as well as laboratory test tubes. *Id.*

The aid was given in the form of balloon "deductions" which, when simple mathematics are applied, are revealed as a system of thinly disguised tax credit for tuition already paid to schools in this suspect class—declared unconstitutional by a three judge court in *Kosydar v. Wolman, supra*. The New York legislature provided that aid "to see that religious parochial schools do not go under for lack of financial support" be given to those schools indirectly through parents who paid tuition to those schools. However, this Court has held that this type of conduit for aid does not have a cleansing effect *Essex v. Wolman, supra* and is not constitutionally permissible. The first three tests for administrative entanglement clearly are not satisfactorily met by Sections 3, 4 and 5 of Chapter 414.

On their face, Sections 3, 4 and 5 provide for less direct state administrative intervention than previously invalidated attempts to aid religious schools have. However, if financial aid is given either directly or indirectly for any purpose, it is axiomatic that those who supply the aid and those who receive it must be held accountable. Basic canons of legality and responsibility are involved.

It is this fourth prong of the test for excessive administrative entanglement which presents the legislatures with a dilemma from which they will find it difficult to extricate themselves either legally or logically. In *Lemon v. Kutzman*, *supra*, and *DiCenso v. Robinson*, 403 U.S. 602 (1971), it was held that the administrative rules established were such that the government was excessively entangled with religion. Ohio's legislature then passed a tuition reimbursement act which is analogous to the act challenged in this case. In Ohio a portion of tuition paid to an almost identical class of schools was returned to parents who had children enrolled in those schools. No restrictions were set by the state to guarantee that the reimbursed tuition money would be spent for non-religious purposes. This lack of administrative control was held to be a defect by a three judge court in *Essex v. Wolman*, *supra*, which was affirmed by this Court:

The parent has voluntarily undertaken an obligation to pay tuition to a non-public school and the school in return has agreed to educate that child in an atmosphere oriented, if not dominated, by the teachings of a specific religion. At the end of the transaction, the parent has applied for and received reimbursement from the State . . . solely and specifically because he has paid that sum to the denominational school. . . . *Since the parents in this scheme serve as mere conduits of public funds, the State retains a responsibility of insuring that the public moneys thus provided and which retain their public character throughout the transaction, are used for constitutionally permissible ends and continue to be so used.* [emphasis added].

Thus, if aid to religious schools, while avoiding exces-

sive entanglement with state administrative supervision, does not incorporate sufficient administrative controls to insure that the aid is used for strictly secular purposes, it is defective with reference to the Establishment Clause. Sections 3, 4 and 5 of Chapter 414, we submit, are so defective.

. . . *any* general purpose aid, lacking non-entangling restrictions on use, constitutes an almost *per se* violation of the Establishment Clause. *Id.*, at fn. 20.

Sections 3, 4 and 5 fail to satisfy the established tests for administrative entanglement, and the political entanglement which this piece of legislation generates is an additional fatal defect.

In a separate concurring opinion in *Walz v. Tax Commission, supra*, Justice Harlan emphasized that the Court must look closely at legislation challenged as giving rise to excessive entanglement between government and religion to see if that legislation avoids the "risk of politicizing religion" and "political fragmentation on religious lines." 397 U.S. at 695.

In *Lemon v. Kurtzman, supra*, the Court, in addressing itself to the divisiveness of political entanglement, said that though ordinarily

. . . political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government . . . political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . The potential divisiveness of such conflict is a threat to the normal political process. . . . To have States or communities divide on the issues presented by state aid to parochial schools

would tend to confuse and obscure other issues of great urgency. . . . Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines is thus likely to be intensified. 403 U.S. at 622-623.

Sections 3, 4 and 5 of Chapter 414 almost guarantee that such political fragmentation and divisiveness on religious lines will be intensified. The amounts of money allowed to be deducted from gross income for New York tax purposes are subject to annual review. If these sections are allowed to stand, the legal basis of constitutionality will be established and, in response to demands on the political system for increased aid, divisive religious confrontations periodically will ensue. Because this open-ended type of aid invites controversy and because religious belief involves emotions, legislation such as this will increase at a geometrical rate the religious divisiveness already created by the existence of the questioned legislative act.

As we have said, the class of schools aided by Sections 3, 4 and 5 is decisively sectarian. There is a direct relationship between the degree to which a class is sectarian and the degree of entanglement that results. If a class receiving public financial aid is decisively sectarian, then it is essential that the element of entanglement be closely scrutinized. *Kosydar v. Wolman*, *supra*. The statute involved in the case at bar does not stand that scrutiny. Inevitable political entanglement at an unconstitutional level is manifest.

4. A special tax incentive or tax credit to reimburse parents for tuition paid to a class of nonpublic elementary and secondary schools which is overwhelmingly church-operated and

church-controlled is an unconstitutional financial support by the government of the teaching of religion.

The business of religion is religion. The business of religiously controlled and operated elementary and secondary schools has been shown to be the infusion of sectarian religion into every facet of a student's educational program.

Circuit Judge Hays, in his dissent against the three judge court's decision on Sections 3, 4 and 5 said:

The benefits of the tax exemption allowed by section 3 are of the same nature as those accorded under the tuition reimbursement provisions of section 2. There is no essential difference between a parent's receiving a \$50 *reimbursement* for tuition paid to a parochial school and his receiving a \$50 *benefit because* he sends his child to a parochial school. *In both instances the money involved represents a charge made upon the state for the purpose of religious education.* [emphasis in last sentence added].

Since the benefits to parents under Sections 3, 4 and 5 are, in fact, charges made upon the state for the purpose of religious education, they are an affront to the Establishment Clause.

This Court ruled in *Abington, supra*, and *Engel, supra*, that public schools supported by public funds may not teach religion through either compulsory prayer or compulsory Bible reading. The melding of public funds into nonpublic schools makes for government support of the teaching of religion in these schools. This Court has held that government must neither aid nor inhibit religion and that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt

to teach or practice religion." *Everson v. Board of Education, supra*, at 15-16

The granting by a state to a taxpayer of the privilege of deducting the face value of any contribution to a legally recognized class of potential recipients is not in dispute in this case. Instead Sections 3, 4 and 5 create essentially a sectarian class and any tuition paid to a school in that class is in anticipation of services to be received. Therefore, we are not dealing here with contributions but with the granting to taxpayers who send their children to religious schools of a tax "deduction" of a substantial sum of money which, in fact, has not been "contributed" and logically cannot be considered a generous gift without anticipation of personal gain. It is clear that these sections do not provide for *bona fide* deductions but rather for a tax credit to parents of children in religious schools.

Because tax credits have been held unconstitutional in *Kosydar v. Wolman, supra*, and direct aid to religious elementary and secondary schools is proscribed in *Lemon v. Kutzman, supra*, under the entanglement doctrine, so then this indirect attempt to achieve identical ends is unconstitutional and proscribed. The New York legislature has attempted, by indirection, to circumvent this Court's proscription against the use of public funds to support the teaching of religion. Such legislative action is contrary to the Establishment Clause.

5. Public financial aid to church-operated and church-controlled elementary and secondary schools constitutes compulsory religion.

The principle of religious liberty antedates the American republic and abhors compulsory religion. Roger Williams wrote: "Forced worship is a stinck [sic] in the nostrils of God" (*The Bloody Tenent of Persecution*); and

Thomas Jefferson wrote in the *Virginia Statute of Religious Liberty*: "... no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief" (Sec. II). This is a part of the philosophy bound up in the religion clauses of the First Amendment.

In *Anderson v. Laird*, 466 F.2d 283 (1972), (*cert. denied* by this Court), the United States Court of Appeals for the District of Columbia held that compulsory chapel attendance at the three federal military academies was compulsory religion and, therefore, repugnant to the religion clauses of the First Amendment.

The majority which affirmed the constitutionality of Sections 3, 4 and 5 of Chapter 414 in the District Court for the Southern District of New York declared in the case now at bar that these sections provided aid to "religious parochial schools." Those religious parochial schools comprise 93.5% of the schools in the class created by this legislative act. These schools teach sectarian religion throughout their academic curriculum.

The aid to religious parochial schools comes from tax credit for tuition already paid and constitutes funds which are subject to state control. When public funds, which are collected from all taxpayers regardless of religious belief or lack of religious belief, are used to aid, either directly or indirectly, elementary or secondary schools which teach religion, all taxpayers are compelled to assist in the support of that teaching of religion. State-coerced financial support of religion is one of the oldest and purest forms of the establishment of religion and is clearly at odds with the Establishment Clause of the First Amendment.

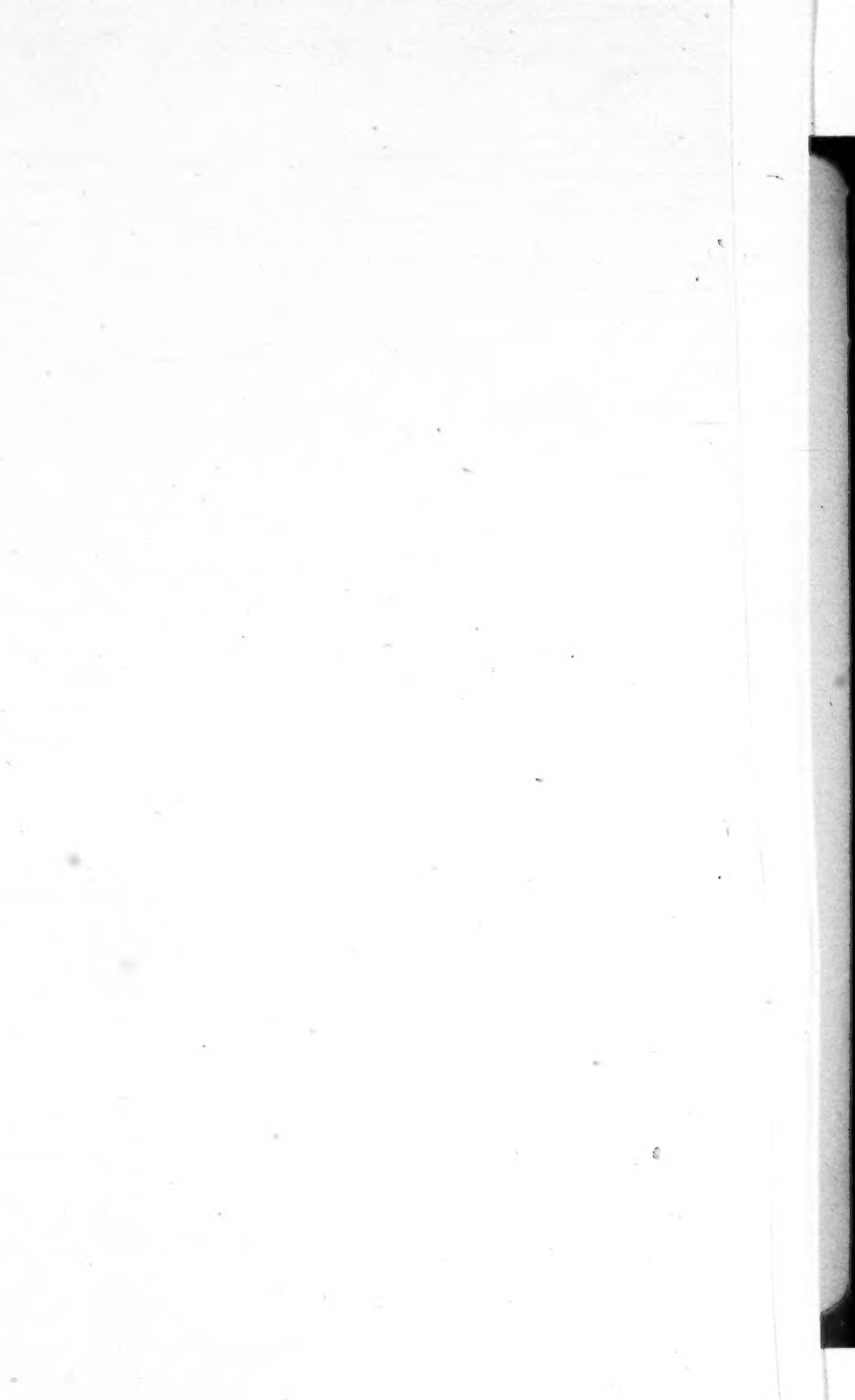
CONCLUSION

That portion of the decision of the District Court for the Southern District of New York dealing with Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972 should be reversed.

Respectfully submitted,

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MAR 5 1973

MICHAEL RODAK, JR.,

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-694, COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY VS. NYQUIST

NO. 72-753, BRYDGES VS. COMMITTEE FOR PUBLIC EDU-
CATION AND RELIGIOUS LIBERTY

NO. 72-791, NYQUIST VS. COMMITTEE FOR PUBLIC EDU-
CATION AND RELIGIOUS LIBERTY

NO. 72-929, CHERRY VS. COMMITTEE FOR PUBLIC EDU-
CATION AND RELIGIOUS LIBERTY

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
CONVENED PURSUANT TO TITLE 28,
SECTIONS 2281 AND 2283

MOTION AND BRIEF OF AMICUS CURIAE
UNITED AMERICANS FOR PUBLIC SCHOOLS

Supreme Court, U.S.
FILED

MAR 19 1973

MICHAEL RODAK, JR., CLERK

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(i)

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
CONVENED PURSUANT TO TITLE 28,
SECTIONS 2281 AND 2283

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE**

United Americans for Public Schools respectfully
moves this Court for leave to file its annexed brief as
amicus curiae.

Applicant is a California nonprofit corporation,
formed in 1953 and operating since then to investigate,
discuss and study governmental affairs in the United
States of America and in the State of California, with
special reference to the public schools and the Constitu-
tions of the United States and of the State of California,
and to disseminate to its members and to the public,

related, objective and educational facts and findings to preserve the purposes of public schools and of the said constitutions and to foster adherence thereto and support thereof.

Applicant has an interest in this case and is vitally concerned in the outcome in that it now has pending in the United States District Court for the Northern District of California a complaint attacking laws that the California Legislature enacted January 17, 1973 and in which the basic question involved is similar to that presented for decision in the instant cases. It is felt there are state constitutional, as well as federal constitutional points involved, and this Court has held that where the Federal Court has jurisdiction it is authorized to determine all the questions in the case, local as well as federal, and the court in this respect has considered state constitutional standards in the interpretation of the Constitution.

While applicant's case is not now before the Court, it might well be in the near future. It is believed that the arguments applicant makes in the annexed brief will be involved.

Amicus Curiae has applied for consent of the parties herein within the time prescribed for filing briefs but responses have not yet been received. Counsel for amicus curiae is a resident of California and will not be able to review all the briefs filed to ascertain the complete specifics of need for additional commentary. But having reviewed some of said briefs, it appears there now is such need and that the points raised in the annexed brief will present additional points not yet covered and will be helpful to the Court. A three-judge court in the District Court of the United States for the Southern District of Ohio, Eastern Division, rendered on December 29, 1972

its opinion holding unconstitutional legislation similar to that involved in the present case. It is felt the Court should have the benefit of analysis of said opinion by amicus. The special considerations will appear more fully herein.

It is therefore respectfully requested on the grounds above that this application for leave to file a brief as amicus curiae be granted.

Respectfully submitted

UNITED AMERICANS FOR PUBLIC SCHOOLS

By

Attorney for Movant.

1

IN THE
SUPREME COURT OF THE UNITED STATES

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DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
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BRIEF

INTEREST OF THE AMICUS CURIAE

United Americans for Public Schools, a California nonprofit corporation, and its members, citizens and taxpayers of the United States and of the State of California, are vitally interested, both personally and economically, in the issues of the instant case because (1) of its concern generally with preserving the purposes of public schools and of our traditional Constitutional Doctrine of Separation of Church and State and because (2) Amicus has filed its complaint in the Northern United States District Court of California to enjoin execution of

California Legislation similar to that which appellants attack, and said suit involves issues similar to those in the instant case.

STATUTES INVOLVED

The statutory provisions involved in these cases appear in Appellant's Jurisdictional Statement which amicus by reference incorporates herein.

QUESTION PRESENTED BY THIS BRIEF

To avoid redundancy in briefing, Amicus poses the following additional single question:

(a) Whether this court should adopt the reasoning and analysis set forth in the three-judge opinion of the United States District Court for the Southern District of Ohio, Eastern Division, Civil Actions Numbers 72-212 and 72-222, decided December 29, 1972, subsequent to the decisions below, titled Robert J. Kosydar, Tax Commissioner of Ohio, et al., Plaintiffs, v. Benson A. Wolman, et al., Defendants, Benson A. Wolman, et al., Plaintiffs, v. Robert J. Kosydar, Tax Commissioner of Ohio, et al., Defendants.

Appellants therein have appealed to this Court (titled herein James Grit, et al., Appellants vs. Benson A. Wolman, et al., and numbered herein 72-1139-ATX). A copy of the opinion is annexed as Appendix B to Appellants Jurisdictional Statement. Application for stay of injunction was made and denied January 22, 1973. Motion to expedite and to advance oral argument was made and denied February 26, 1973. •

STATEMENT OF THE CASE

Reference is made to the foregoing motion and to Appellant's Statement.

ARGUMENT

A brief preliminary review of some authorities may be helpful. In June 1971 this Court struck down laws of Pennsylvania and Rhode Island that would have diverted public funds to parochial schools and thus would have entangled excessively the state and churches, and would have advanced the indoctrination of religion in violation of the First Amendment to our Constitution. The Pennsylvania plan in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), would have given public funds to church schools under the guise of "purchasing secular services," i.e., paying the parochial schools to educate children in subjects supposedly without religious significance. The Rhode Island device in *Earley v. Di Censo*, 403 U.S. 602 (1971), would have given to teachers of secular subjects in church schools state funds as supplementary salaries. In October 1972 this Court struck down as unconstitutional an Ohio Plan in *Wolman v. Essex*, 342 F. Supp. 399, affirmed ___ U.S. ___, 41 L.W. 3167 (1972), for reimbursing from public funds parents of parochial and private school children for tuition paid. The Supreme Court cited its earlier decisions and upheld a ruling of the Ohio special three-judge federal panel holding the program violated the Constitution as an "establishment of religion." A Pennsylvania three-judge district court in *Lemon v. Sloan*, 340 F. Supp. 1356 (1972) also held such a plan unconstitutional and said this in part:

"[We] do not perceive any constitutional significance in the fact that payments are made in the

form of reimbursements to the parents, a conduit plan, or directly to the school. The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family incomes through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education."

With reference to the question presented, Amicus refers to and incorporates herein the opinion of the Ohio United States District Court, dated December 19, 1972, Supreme Court number 72-1139. It correctly analyzes the unconstitutional nature of the statutes attacked below. They are discriminatory, involved and unconstitutional classifications, and would produce political entanglement and religious rancor.

That opinion presents an analysis of this court's prior holdings in the area of Constitutional law and resolves any apparent inconsistency. It pinpoints their differences. It focuses on classification.

The District Court opinion referred to services that are generally held valid, such as police or fire protection or bus transportation. It said that

"Where the affected class of a legislative enactment is a broad and internally pluralistic one, then as a matter of law, the primary effect of such a statute is not the advancement of religion, and strict judicial inquiry into such statute need be had only along the rubric of administrative, and not political entanglement. See *Tilton vs. Richardson*, *Infra* 403 U.S. at 688."

The Court then held

"Conversely, where the affected class is predominantly religious or sectarian and the benefits provided are not inherently ideologically neutral, as where the state provides monetary grants to parents or institutions belonging to a class that is essentially religious in character, then, as a matter of law, the primary effect of such a statute is to advance religion, and the statute must be closely scrutinized for possible entanglement effects, primarily in terms of political entanglement."

To condense further, the Court held:

"When a statute has the effect, under prong two of the *Lemon* test, of conferring benefits to predominantly religious groups, clear and convincing evidence must be adduced that such risk will not be increased." (emphasis added).

Reasons for the Court's holdings and for the principles and precedents are set forth in detail and cogently in the opinion.

The application to the case at bar of some of the principles and precedents of that case can be succinctly paralleled as follows:

FIRST: the court disposed of the fiction that tax credits are for parents rather than for tuition payments to church schools.

Aside from the obvious conclusion that there is no difference in substance between credits and subsidies, it concluded, based upon *Griffin v. State Board*, 377 U.S. 218, and other cases, that "tax exemptions, deductions and credits, like reimbursement grants, are all benefits conferred by the state and that they may not be employed in a fashion which impedes public policy or

violates constitutional protections." The court held that such tax credits grant such taxpayers an economic advantage not available to taxpayers generally, and that since the benefited class of taxpayers is sectarian the classification is unconstitutional. So also in the case at bar.

SECOND: the court disposed of the argument that the parent of a nonpublic school student is performing a reimbursable service by sending his child to a private rather than a public school. The court correctly pointed out that such a contention theoretically would lead to the conclusion that every individual who foregoes use of a broadly provided public service, such as welfare and public hospitals for which the general public is taxed, should be reimbursed for his proportionate share.

THIRD: the court also disposed of the odd contention that the Statutes merely enforce the free exercise of religion rights of parents and taxpayers. The court noted that no federal case heretofore ever has countenanced placing an affirmative duty upon the state to appropriate money so that religious beliefs may be proselytized or religious institutions assured; rather, this court has maintained steadily that the state must remain *neutral* in such situations.

FOURTH: and highly important, the court implicitly holds that statutes similar to those below will generate political controversy along religious lines. There would be annual debates and strident apposition and recurrent religious and political strife over the need to tap general revenue for ever increasing private school costs. Governmental entanglement would follow as the night the day.

A review of the religious rancor, acrimony, strife and cruel warfare elsewhere in the world today against the

background of historic reasons leading to our First Amendment demonstrates the wisdom of our constitutional founders. They remembered from education and experience that the Bill of Rights was a necessary condition to adoption of the Constitution. They remembered the extremes of sectarianism that had plagued the Old World. They were far closer to these experiences than us in point of time. They remembered how the mixing of state and church forced many of our colonists to seek refuge upon our shores. They remembered why for them and for their posterity the separation of church and state was and is the sine qua non for religious freedom.

See the following progenitors of our First Amendment: Maryland's Toleration Act (1649); the Charter of Rhode Island (1663); Samuel Adams, *The Declaration of the Rights of Men* (1772); John Adams, *Feudal and Canonical Law* (1768); the First Continental Congress' Declaration of Rights and Liberties (1774); Virginia's Declaration of Rights (1776); the Bill of Rights of Maryland (1776); the Bill of Rights of New York (1777); the Bill of Rights of Massachusetts (1780); and also Virginia's The Act for Establishing Religious Freedom (1785).

This fundamental principle for religious peace became so imbedded in the organic structure of our nation that by 1876 the Congress required each state admitted into the Union to provide constitutionally for a public school system free from sectarian control.

Yet, this court has had to wrestle repetitively with recurrent drives of religious sects to obtain public funds for a separate church school system. Such a religiously oriented separate school system differs markedly from a public school system as appears from prior opinions of this court.

1. The prime purpose of a church school is to foster its particular faith and to indoctrinate the attending children. Some reject the American ideal of religious freedom for all creeds and move to make their religion compulsory as the only "true" one, and to that end conduct their own separate church schools. A public school is conducted without regard to creed.

2. A school under religious control segregates its children along sectarian lines. A public school, on the other hand, is an American melting pot for a unified and enlightened citizenry.

3. There is no effective public control over church-related schools, their teachers, schoolbooks or what is taught. The tax remission of parochial school parents and enforced additional taxation of others truly would be taxation without representation. Education in a church school is also honeycombed with religious indoctrination. This permeates all subjects: mathematics, science, foreign languages and other studies. In addition, some church-school texts and teachers inveigh against other faiths, impressing upon children that they are forbidden to join other organizations and, under church dogma, are bound to shun other groups. In a public school, the citizens themselves at local levels control the curricula and inculcate principles of Americanism.

4. Some operators of schools under church control seem to have an insatiable appetite for expansion, excusing this under the "population explosion." That sect which conducts the most schools by far, when in control of the state elsewhere in the world, denies to rival sects and schools the public support it seeks in this country.

5. Schools under church control are competitors of the public schools, openly or covertly. This leads to belittling, downgrading, criticism and the suicidal destruction of the public schools. Experience so demonstrates.

The current drive is for tax credits in reimbursement of tuition to those parents who reject public schools and elect to send their children to private schools. Tuition may be the lifeblood of private schools, but we submit this is a private problem that calls for private solutions. There are less violent alternatives than direct or indirect public support. (See, *When Parochial Schools Close*, 1972, by Martin A. Larson. Robert B. Luce, Inc., 2000 N Street, N.W., Washington, D.C.).

CONCLUSION

The price of public support for church schools would be the emasculation from our organic political structure of those protective constitutional provisions that our founders struggled mightily and with great wisdom to spell out for us. Their retention and maintenance are required for our religious and political security.

The wit of man cannot name or devise a proposed form of state aid to church schools that will ~~not~~ undermine the historic ideal of church-state separation, violate both Federal and State constitutions, severely damage—if not destroy—the American public school system and American educational standards, accelerate the fragmentation of our people, and acutely increase political and religious dissension.

It is therefore respectfully submitted that this Court should declare unconstitutional the laws of New York seeking to provide reimbursement for tuition paid to private schools and tax credits for tuition.

Respectfully submitted,

Henry C. Clausen
Attorney for United Americans for Public Schools

CERTIFICATE OF SERVICE

I, Henry C. Clausen, attorney for movant herein, and member of the Bar of the Supreme Court of the United States, certify that a copy of the foregoing Motion for Leave to File Brief Amici Curiae and a copy of the brief in support of said motion have this day been mailed, with sufficient postage prepaid to: Mr. Leo Pfeffer, Attorney at Law, 154 East 84th Street, New York, New York 10028; Honorable Louis J. Lefkowitz, Attorney General, State of New York, State Capitol, Albany, New York 12224; Mr. John Haggerty, Senate Chambers, The Capitol, Albany, New York 12224; Messrs. Davis, Polk & Wardwell, Attorneys at Law, One Chase Manhattan Plaza, New York, New York 10005.

San Francisco, California, March 5, 1973.

Henry C. Clausen

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IN THE
Supreme Court of the United States

No. 72-694

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*,

Appellants,

v.

EWALD B. NYQUIST, *et al.*,

Appellees.

On Appeal from the United States District Court
for the Southern District of New York

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF AMICUS CURIAE ON BEHALF OF THE
NATIONAL EDUCATION ASSOCIATION AND
THE HORACE MANN LEAGUE**

The National Education Association and the Horace Mann League hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief amicus curiae on the merits of the case at bar. Appellants have consented to the filing of this brief. Appellees have not.

The National Education Association (NEA) is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. It is the largest professional organization in the nation. Currently, NEA has over one million, one hundred thousand regular members, the large majority of whom serve public school systems in the various States.

The Horace Mann League is an independent national organization of some five hundred leading educators. The League exists to perpetuate the ideals of Horace Mann and its basic purposes are to strengthen public education and to preserve the American tradition of separation of church and state.

This appeal involves a challenge to the constitutionality of Sections 3, 4 and 5 of Chapter 414 of the New York Laws, 1972. These provisions bestow tax benefits upon parents who have paid tuition for their children to attend nonprofit, nonpublic elementary and secondary schools. More than 90% of the children who attend nonpublic elementary and secondary schools in New York are enrolled in schools operated and controlled by churches or other religious groups. Nearly 85% of the children are enrolled in Roman Catholic parochial schools. Appellants claim that the New York statute violates the Establishment Clause of the First Amendment to the United States Constitution.

NEA and the Horace Mann League acknowledge the contributions made by private sectarian educational institutions in this country. Nonetheless, we are concerned over diversion of public money to the support of those institutions and the impact of such support upon the future of public education. We seek leave to file this brief because Sections 3, 4 and 5 of the New York statute would bring about such a diversion.

The maintenance of a system of public education is a "paramount responsibility" that "ranks at the very apex of the function" of a State. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). See also *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Public funding of sectarian schools, whether through direct subsidy or through indirect means such as tax benefits to parents of children who attend them, could have a serious effect on the capability of the public schools to discharge this "paramount responsibility." First, such funding would divert badly needed public money to these religious institutions or to those who support them. There is at this time a financial crisis not only in private education, but also in public education. The one crisis ought not be alleviated by means that exacerbate the other. Second, such funding could lead to a renewal of the often bitter church-state controversies which the First Amendment seeks to avoid and the injury to the educational environment in the public schools that such religious divisiveness would engender.

Lastly, to the extent that funding of private sectarian education increases the enrollment at such schools, it will reduce the pluralistic composition of public school student bodies so vital to the democratic ideal and to the educational process itself. See President's Commission on School Finance, *Schools, People and Money: The Need for Educational Reform*, pp. xix, 15 (March 3, 1972). Mr. Justice Brennan, concurring in *School District v. Schempp*, 374 U.S. 203, 241-242 (1963), expressed the high purpose of American public education in the following terms:

"... [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. . . . It is implicit in the history and character of American public education that the

public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions [citation omitted]." (Emphasis in original.)

Wherefore, the National Education Association and the Horace Mann League request that this Court grant leave to file the accompanying brief amicus curiae urging reversal of the judgment below.

Respectfully submitted,

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IN THE
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No. 72-694

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
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Appellants,

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EWALD B. NYQUIST, *et al.*,

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On Appeal from the United States District Court
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BRIEF AMICUS CURIAE
ON BEHALF OF THE NATIONAL EDUCATION
ASSOCIATION AND THE HORACE MANN LEAGUE

STATEMENT OF THE CASE

This case is before the Court on appeal from the holding of the United States District Court for the Southern District of New York, sitting as a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2283, that Sections 3, 4, and 5 of Chapter 414 of the New York Laws, 1972, do not violate the Establishment Clause of the First Amendment to the United States Constitution.¹ The challenged pro-

¹ The opinion of the district court is reported at 350 F. Supp. 655 and reprinted at pages 1a-46a of the Jurisdictional Statement filed by the appellants in this case. The Jurisdictional Statement will be cited hereinafter as "J.S." plus the page reference; the Appendix as "App." plus the page reference.

visions grant tax benefits to parents who have paid tuition for their children to attend nonprofit, nonpublic elementary and secondary schools. More than 90% of the children in nonpublic elementary and secondary schools in New York attend schools operated and controlled by churches and other religious groups. Nearly 85% of them are enrolled in Roman Catholic parochial schools.²

Chapter 414 of the New York Laws, 1972 (hereinafter referred to as the "Act" or the "New York statute") contains five parts:

- Part 1 (Sec. 1)—monetary grants by the State to nonpublic schools serving low-income families for the maintenance and repair of buildings (J.S. 47a-50a);
- Part 2 (Sec. 2)—tuition grants by the State to low-income parents of pupils attending nonpublic schools (J.S. 50a-53a);
- Part 3 (Sec. 3, 4 and 5)—tax benefits for parents who send their children, and pay tuition, to nonpublic schools (J.S. 53a-54a);
- Part 4 (Sec. 6 and 7)—financial aid for public schools which have increased enrollment due to the closing of nonpublic schools (J.S. 55a-56a); and
- Part 5 (Sec. 8, 9 and 10)—financial aid to public school districts for the purchase of nonpublic school buildings where nonpublic schools have closed down (J.S. 56a-58a).

Each of the first three parts of the Act specifically excludes profitmaking schools from the category of nonpublic schools (J.S. 48a, 51a, 54a).

Part 3 of the Act provides explicitly that, for New York State income tax purposes, an individual shall be

² See Univ. of the State of New York, *1970-71 Annual Educational Summary*, Table 30, p. 35.

entitled to subtract "from his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic [elementary or secondary] school on a full-time basis" (J.S. 6a-7a; 350 F. Supp. at 659).³ Eligibility

³ The table referred to in the text above provides (J.S. 54a; 350 F. Supp. at 659):

If New York adjusted gross income is:	The amount of the allowable exclusion for each dependent is:
Less than \$9,000	\$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	0

The following table shows the estimated net benefits to taxpayers under Part 3 of the Act. The information is taken from the memorandum which accompanied the bill in the New York Legislature (J.S. 7a, 45a; 350 F.Supp. at 659, 676):

Estimated Net Benefit to Family		
One Child	Two Children	Three or more
\$50.00	\$100.00	\$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

for the benefit is conditioned upon payment by the individual of at least \$50 in tuition for each such dependent. The benefit may be claimed only by persons with adjusted gross incomes of less than \$25,000 who do not receive a tuition assistance payment under Part 2 of the Act. The exclusion from adjusted gross income may be as much as \$1,000 for each child, up to three children, with the estimated net benefit to taxpayers not exceeding \$50 per child. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases.

The Legislature made specific findings and declarations in connection with Part 3 of the Act:

"1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.

"2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by tax courts.

"3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

"4. Tax laws also authorize deductions for education related to employment.

"5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition, paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law." (J.S. 53a.)

On May 25, 1972, the Committee for Public Education and Religious Liberty, an unincorporated association, and

a number of taxpayers, some of whom are parents of children attending public schools, instituted suit challenging the constitutionality of Parts 1, 2 and 3 of the Act under the Establishment and Free Exercise Clauses of the First Amendment. The complaint sought a judgment declaring Parts 1, 2 and 3 unconstitutional and enjoining their enforcement. (App. 7a-15a.)⁴

In their complaint plaintiffs alleged that the Act "authorizes New York State tax benefits for payments of tuition to schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial and dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach" (App. 11a-12a). These allegations were not specifically denied by the State defendants (App. 64a-65a). The complaint further alleged, among other things, that the Act "constitutes governmental financing and subsidizing of schools which are controlled by religious bodies, organized for and engaged in the practice, propagation and teaching of religion, and of schools limiting or giving preference in admission and employment to persons of particular religious faiths" and "constitutes governmental action whose

⁴ Separate motions for intervention as parties defendant were made by a group of parents of children in nonpublic schools and by State Senator Earl W. Brydges, as Majority Leader and President *pro tempore* of the New York State Senate (App. 17a-59a). Both motions were granted on June 28, 1972 (App. 60a-62a, 72a).

purpose and primary effect is to advance religion" (App. 12a-13a).

A three-judge court was convened, consisting of Circuit Judge Paul R. Hays and District Judges John M. Cannella and Murray I. Gurfein. After a hearing on July 6, 1972, the court unanimously held Parts 1 and 2 of the Act violative of the Establishment Clause. The court divided on Part 3. Judges Cannella and Gurfein held that this part did not violate the Establishment Clause. Judge Hays dissented. Judges Cannella and Gurfein also held that Part 3 was severable from Parts 1 and 2. As to this, too, Judge Hays dissented.

The district court accepted the legislative findings and declarations set forth in the statute, "except where they purported to state principles of applicable constitutional law" (J.S. 8a; 350 F.Supp. at 659). Although the court did not go behind these findings and declarations, it did note that "regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support" (J.S. 9a; 350 F. Supp. at 660).

In striking down the maintenance payments provided under Part 1 of the Act as having the effect of advancing religion, the court observed, *inter alia*, that although the payments were "neutral" in that they were not directly connected with religious activity, they were given to none "but a small class of institutions, almost all Roman Catholic, in deprived areas" (J.S. 22a; 350 F.Supp. at 666).

With respect to Part 2 of the Act providing for partial reimbursement to needy parents of the tuition they pay to send their children to nonpublic schools, the court noted that there is no distinction between a grant to a family and a grant to a parochial school "where the parent is a mere conduit for a payment of tuition" (J.S.

26a-27a; 350 F.Supp. at 668). The court stated that "it is the school which benefits by getting tuitions from State funds which it might otherwise not receive" (*id.*; J.S. 26a-27a). Moreover, "a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment" (J.S. 29a; 350 F.Supp. at 669). Finally, the court rejected the argument that the poor economic health of the parochial school system and the possible consequence of forced absorption of their burdens by the public schools could overcome the commands of the First Amendment (J.S. 30a-31a; 350 F.Supp. at 669).

Judges Gurfein and Cannella found the tax benefit provided in Part 3 for tuition paid by parents to nonpublic schools different from the other forms of subsidy in Parts 1 and 2, and constitutional. They gave five reasons for their conclusion (J.S. 32a-33a; 350 F.Supp. at 670-671): (1) The tax benefits were not restricted, as were the maintenance payments, to areas containing practically only Catholic parochial schools, but covered attendance at all nonprofit private schools in the State; (2) the tax benefit, unlike the maintenance payments and tuition reimbursement, did not involve money from the State Treasury; (3) the tax benefit provisions had "a particular secular intent—one of equity—to give some recompense by way of tax relief to all citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools"; (4) "the benefit to the parochial schools, if any [realized as a result of the tax benefit], is so remote as not to involve impermissible financial aid to church schools"; (5) the tax benefit would involve "a minimum of administrative entanglement with the nonpublic schools" and "the on-going political activity" it would generate would not be as likely as direct subsidy laws "to cause division on strictly religious lines."

Circuit Judge Hays, in his partial dissent, said that the "purpose and effect" of Part 3 was "to subsidize religious training for children" (J.S. 41a; 350 F. Supp. at 674). Judge Hays pointed out that "[t]here is no essential difference between a parent's receiving a \$50 *reimbursement* for tuition paid to a parochial school and his receiving a \$50 *benefit because* he sends his child to a parochial school" (J.S. 43a, emphasis in original; 350 F. Supp. at 675). In his view the tax benefit was enacted for higher income families as a substitute for the partial subsidies made available to low-income parents by Part 2 of the Act. To him, those two parts of the Act were inseparable and unconstitutional (J.S. 45a-46a; 350 F. Supp. at 676).

ARGUMENT

I

INTRODUCTION

We argue in this brief that Part 3 of the Act violates the Establishment Clause of the First Amendment to the Constitution. This Part, we submit, deviates substantially from the "neutrality" required of the State in its dealing with believers and non-believers and among the various religions. *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970); *School District v. Schempp*, 374 U.S. 203, 215 (1963); *id.* at 244-46 (Brennan, J., concurring); *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court set forth three "tests" as guidelines to a determination whether a statute offends the Establishment Clause:

"First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion

... ; finally, the statute must not foster an excessive government entanglement with religion.”⁶

It is our understanding that these tests must be read in the conjunctive. A statute is unconstitutional if it fails any one.

We contend here that Part 3 of the New York statute violates the neutrality principle in that its principal or primary effect is to advance religion, especially the Roman Catholic religion, by conferring a tax benefit upon a limited class of taxpayers consisting predominantly of parents who send their children to religious schools, especially Catholic parochial schools. It well may be that the New York statute is unconstitutional for one or more additional reasons under the Establishment Clause, i.e., that it sponsors a single religion or religion generally, that its purpose is to promote or advance a single religion or religion generally, or that it fosters an excessive entanglement between government and religion, but those issues we shall leave to others.

⁶ There may well be a fourth test in addition to the three guidelines set forth in *Lemon*. A statute granting direct government subsidies to churches or religious schools, without restrictions as to use, may well constitute “sponsorship” of religion and thus violate the Establishment Clause even though, because the class of recipients is extremely broad, the purpose and primary effect of the statute is secular and no entanglement ensues. See *Walz v. Tax Commission*, *supra*, 397 U.S. at 675; *Everson v. Board of Education*, *supra*, 330 U.S. at 16; *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

II

**THE PRINCIPAL OR PRIMARY EFFECT OF THE
TAX BENEFIT PROVIDED BY THE ACT IS TO
ADVANCE RELIGION GENERALLY AND A SINGLE
RELIGIOUS FAITH IN PARTICULAR**

The New York statute permits a taxpayer to exclude a specified amount from his adjusted gross income, and hence from his taxable income, for each dependent, not exceeding three, who attends on a full-time basis a non-profit, nonpublic elementary or secondary school in the State. The amount of the exclusion decreases in steps from \$1,000 to \$100 per dependent as the taxpayer's adjusted gross income increases. The exclusion is unavailable to taxpayers whose adjusted gross income exceeds \$25,000 and may not be taken with respect to a dependent unless the taxpayer has paid at least \$50 in tuition for the dependent to attend the nonpublic school. (J.S. 53a-54a.)

The fall 1970 school and school enrollment figures for New York State show 1,950 nonpublic elementary and secondary schools at which 787,853 children were enrolled. 663,855 of these children (84.3%) were enrolled in Roman Catholic parochial schools. An additional 66,831 children (8.5%) attended schools operated and controlled by other religious groups. Univ. of the State of New York, *1970-71 Annual Educational Summary*, Table 30, p. 35.⁶ There were approximately 4,412 public elementary and secondary schools in the State in 1970. Their student population approached 3,500,000. *Id.*, Tables 4 and 9, pp. 7 and 13.⁷

⁶ The figures in the text include enrollment in profit-making private schools, which are excluded from the definition of nonpublic schools under Part 3 of the New York statute (J.S. 54a).

⁷ As far as we know, no more recent figures are available with respect to how the nonpublic school population in New York divides

When viewed against the composition of the nonpublic school population of New York, the terms of Part 3 make manifest its impermissible effect, the advancement of religion. More than 90% of the children attending nonpublic schools in New York are in religious schools. These are predominantly schools which, as the district court found (J.S. 17a; 350 F.Supp. at 633):

- “(a) impose religious restrictions on admissions;
- (b) require attendance of pupils at religious activities;
- (c) require obedience by students to the doctrines and dogmas of a particular faith;
- (d) require pupils to attend instruction in the theology or doctrine of a particular faith;
- (e) are an integral part of the religious mission of of the church sponsoring [them];
- (f) have as a substantial purpose the inculcation of religious values;
- (g) impose religious restrictions on faculty appointments; and
- (h) impose religious restrictions on what or how the faculty may teach.”

among Catholic, other sectarian and non-sectarian schools. Statistics published by the Office of Education of the U. S. Department of Health, Education and Welfare show that as of fall 1971, enrollment in the New York public elementary and secondary schools was estimated at 3,486,000 and in the State's nonpublic counterparts at 837,100. *Digest of Educational Statistics, 1971*, Tables 27 and 40 at pp. 24 and 34. Note, however, that the legislative findings with respect to Part 4 of the Act here challenged contain the statement that fewer than 760,000 students were enrolled in New York's nonpublic schools in the fall 1971 (J.S. 55a). The Office of Education's fall 1972 enrollment estimates have not yet been published; we understand that they are 3,501,000 for New York's public, and 743,000 for New York's nonpublic, schools.

See *Tilton v. Richardson*, 403 U.S. 672, 680, 682 (1971), suggesting that these characteristics mark schools where "religion so permeates the secular education" that the "religious and secular educational functions" of the school are inseparable.⁸

The challenged tax benefit provisions have but one actual, direct effect: Many parents who pay taxes to support the public schools but choose not to use them and who pay tuition to a nonpublic school, as a result of making that choice realize tax savings of up to \$150. Thus, the direct and immediate effect of Part 3 is to advance religion. It does so by bestowing a tax savings upon a class of persons more than 90% of whom are members of the class solely because they elect to educate their children in religious institutions. Indeed, approximately 85% of the advantaged class members receive the tax benefit because they choose a particular religious education, Roman Catholic. Except for the few class members who use non-sectarian schools, all are favored as a consequence of a manifestation of their religious preference.

From the tax benefit, to be sure, two other consequences are expected to flow. The tax benefit is intended to induce and encourage its recipients to continue to send their children to nonpublic schools (J.S. 9a; 350 F.Supp. at 660). If they do so, the expected result would be that the enrollment in nonpublic schools would increase, stay level or decrease less than would be the case if no tax benefit were granted. Level, increased or insubstantially decreased enrollment at nonpublic schools would in turn achieve the ultimate expected effect of the statute and

⁸ See also *Tilton v. Richardson*, *supra*, 403 U.S. at 685-86, where the Court, quoting from *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970), stated, "The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.'"

the apparent legislative goal to which it is directed: Keeping the public school population below what it would be if substantial numbers of school children were to shift to public schools and saving the costs involved in educating a larger public school population. If the tax benefit would not substantially influence the size of nonpublic school enrollment, however, these expected consequences would not occur.

The class of persons benefited by the direct and immediate effect of the statute and the classes which would be benefited by each of its other expected consequences differ. The class benefited by the direct and immediate effect, realization of tax savings, is made up of taxpayers who pay tuition to send their children to nonpublic schools. The class benefited by the first of the other expected consequences, maintenance of nonpublic school enrollment, is the nonpublic schools. The class benefited by the second, a saving of educational costs to the State, includes the State and those of its taxpayers who would be taxed to produce the revenues to meet those costs.

The classes benefited by the direct and immediate effect of Part 3 and by its first expected consequence consist, respectively, of taxpayers who choose to send their children to nonpublic schools and of the nonpublic schools themselves. These classes are predominantly sectarian. Only when the class of persons which Part 3 ultimately intends to touch, the general taxpaying public, is reached does the disproportionate slant in favor of religious institutions and persons preferring them diminish. This ultimate result is the apparent purpose of the statute, a hoped-for but not a present effect of its enactment. As such, it does not, we believe, correct or justify the advancement of religion and religious institutions which must actually occur by reason of the statute before any broader secular benefits can be realized.

Parenthetically, this hoped-for ultimate result—saving of educational costs to the State—is apparently unlikely to occur and if it does, any savings would be short-lived. At least this is the view taken by the 1972 Report of New York State Commission appointed by the Governor and the Board of Regents to review the quality, cost and financing of elementary and secondary education in the State.⁹ The New York Commission, better known as the Fleischmann Commission, after an in-depth study, concluded that although the per pupil expenditure in the public schools is currently higher than in parochial schools, this differential is rapidly disappearing, largely because of the substitution of lay teachers for religious-order teachers in Catholic Schools (Fleischmann Report, p. 5.4). Moreover, “[t]his trend will certainly accelerate if Catholic teaching personnel come to rely on public aid in support of their wage demands” (*id.*). The Commission further concluded that while Catholic parents are moving away from sending their children to parochial schools, “[t]here is no evidence that tuition increases have significantly affected enrollment” (*id.* at 5.23) and that this decline would continue “even if state aid were provided at levels which would eliminate the need for all tuition payments” (*id.* at 5.4). The Fleischmann Commission summed up these findings in the following terms (*id.*):

“Thus, over a period of years, the savings which now accrue to the state because of the existence of non-public school systems will greatly diminish as increased amounts of state aid are required to maintain those systems.”

We submit that the direct and immediate effect of Part 3—the realization of tax benefits by persons 90%

⁹ *Report of the New York State Commission on the Quality, Cost & Financing of Elementary & Secondary Education*, Vol. 1, Chapter 5, “Aid to Nonpublic Schools,” pp. 5.1-5.56 (1972) (hereinafter referred to as the “Fleischmann Report”).

or more of whom obtain the tax advantage by reason of their support of religious institutions—cannot be considered “incidental” to the hoped-for, religiously neutral consequences. *Tilton v. Richardson, supra*, 402 U.S. at 679. As indicated, any religiously neutral consequences are speculative and at best are unlikely to occur in other than the short run. The only reasonable conclusion, then, is that the primary and principal effect of this statute, which favors a limited class of persons the overwhelming majority of whom fall on the favored side of the line because they have exercised religious preferences, is to advance religion. See *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972): “The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause. . . .”

In Establishment Clause cases holding that a challenged statute did not have as its primary effect the advancement of religion, the class of persons favored by the statute has always been exceedingly broad. The bus transportation provided in *Everson v. Board of Education*, 330 U.S. 1 (1947), was made available to all public and nonpublic school pupils. So, too, were the textbooks at issue in *Board of Education v. Allen*, 392 U.S. 236 (1968). The tax exemption in *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970), applied to a “broad class of property owned by nonprofit, quasi-public corporations, which include[d] hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups,” as well as churches.¹⁰

¹⁰ The instant case does involve a tax benefit, as did *Walz*. But the cases would be similar only if, in *Walz*, the entities eligible for tax exemption consisted predominantly of religious organizations and if, here, the provision of tax benefits for attendance at nonpublic schools was a long and established practice commonly followed in the several States. *Walz v. Tax Commission, supra*, 397 U.S. at 676-77. The Court’s statement in *Lemon* is equally apt here: “We have no long history of state aid to church-related edu-

And the construction grants considered in *Tilton v. Richardson*, *supra*, applied generally to institutions of higher learning.

In the recent case of *Kosydar v. Wolman*, C.A. No. 72-212 (S.D. Ohio, Dec. 29, 1972), *pending on petition for certiorari*, 41 U.S.L.W. 3464 (Dkt. No. 72-1139), *motion to expedite and advance oral argument denied sub. nom. Grit v. Wolman*, February 26, 1973, 41 U.S.L.W. 3462, a class of beneficiaries closely similar to the class favored by Part 3 was involved. The three-judge court in *Kosydar* unanimously invalidated on Establishment Clause grounds an Ohio statute providing for tax benefits to a class consisting for the most part of parents who send their children to nonpublic schools.¹¹

cational institutions comparable to 200 years of tax exemptions for churches." *Lemon v. Kurtzman*, *supra*, 403 U.S. at 624. Furthermore, in *Walz* the elimination of the property tax exemption for churches there in issue would have tended "to expand the involvement of government" in affairs of religion rather than to decrease it. *Walz v. Tax Commission*, *supra*, 397 U.S. at 664, 674. Elimination of the tax benefit involved here, however, will lessen the interaction of church and state.

¹¹ The Ohio statute made the credit available not only to parents whose children attended nonpublic schools, which, as here, were predominantly Catholic or otherwise sectarian, but also to (1) persons enrolled in certain home instruction programs; (2) persons enrolled in certain public adult high school continuation programs, schools for tubercular persons, and vocational and basic literary programs to the extent that tuition was charged such persons and not paid for by local school districts; (3) persons who paid non-resident public school tuition payments; and (4) certain persons who incurred tuition or fee expenses in public or private programs for handicapped children. *Kosydar v. Wolman*, slip. op. at 5-6. Based on the limited statistical evidence presented, the court concluded that the aggregate of the non-sectarian beneficiaries under the statute was insignificant in relation to the size of the "overwhelming sectarian subclass of nonpublic school parents in Ohio" and thus the categories of public school parents outlined above "will not alter in a meaningful fashion the sectarian nature of the recipient class taken as a whole." *Kosydar v. Wolman*, slip op. at 23.

The court ruled that "[W]here the affected class is predominantly religious or sectarian and the benefits provided are not inherently ideologically neutral, as where the state provides monetary grants to parents or institutions belonging to a class that is essentially religious in character, then, as a matter of law, the primary effect of such a statute is to advance religion. . . ." *Kosydar v. Wolman*, slip op. at 11 (emphasis supplied).¹²

The idea that a statute cannot have as its primary effect the advancement of religion is grounded, as we have noted, on the principle of neutrality dictated by the Religion Clauses. Mr. Justice Harlan, concurring in *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970), discussed the application of this neutrality principle in the following terms:

"Neutrality in its application requires an equal protection mode of analysis. The Court must survey

¹² To the *Kosydar* court, however, this conclusion did not end the case. It only required that the statute be scrutinized for "possible entanglement effects, primarily in terms of political entanglement" (*Kosydar v. Wolman*, *supra*, slip op. at 11, emphasis in original). The court found such political entanglement, which it conceded would almost of necessity follow from its finding as to the primary effect of the statute: "It is virtually inconceivable that a law benefiting citizens along religious lines or because of their status as members of religious sects can be placed in the legislative arena without greatly increasing the risk of promoting religious rancor and acrimony" (*id.* at 13). Political entanglement may well be likely where a predominantly sectarian group is the beneficiary of a particular statute. However, this Court has viewed the primary effect of a statute and the entanglement it harbors as independent grounds for invalidation under the Establishment Clause. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). A gift of a small parcel of state-owned property to a particular religious institution with no strings attached may not produce entanglement of any sort, but its primary, and hence invalidating, effect may be to advance religion. In *Lemon v. Kurtzman*, *supra*, 403 U.S. at 613-14, the Court invalidated Pennsylvania and Rhode Island statutes solely on entanglement grounds, stating explicitly that it "need not" reach "the principal or primary effect" question. See also *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

meticulously the circumstances of government categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."

The effect of Part 3 is the same as that which would result from a religious gerrymander. The class of affected taxpayers—parents of children in nonprofit, nonpublic schools—consists predominantly of parents of children in religious schools. Had Part 3 provided a tax benefit *only* for taxpayers who send their children to religious schools, or to parochial schools, it would be unlawful. The result here is much the same. Instead of a class wholly made up of supporters of religious schools, it is more than 90% so constituted, and about 85% constituted of parents whose children attend parochial schools. Nonpublic schools in New York do not comprise a small segment falling within the "natural perimeter" of a "broad" class since the class itself is overwhelmingly religious by its very nature.

We do not urge that every action of the State which has the primary effect of benefiting believers but not nonbelievers or of favoring one religion above other religions necessarily offends the Establishment Clause. For example, even though in a given municipality all of the people who lived in fine houses were of one religion while all who earned less than \$5,000 were of another, the establishment of a real estate tax maximum, or of an income tax exemption for low-income taxpayers, would not be invalid under the Establishment Clause. Members of the favored class would be favored not because of their religion but regardless of it. They would be advantaged without regard to any affirmative exercise of a religious preference. In the instant case, however, the class is

avored *because* its members act to support schools which are religious institutions. To qualify for the tax benefit they must affirmatively exercise religious preferences by sending their children to religious schools.

The fact that the benefit here conferred comes by way of a lower tax bill rather than a direct grant from the State Treasury is of no constitutional significance in determining whether the benefit has as its primary effect the advancement of religion. If this consideration bears on Establishment Clause cases at all, it does so only with respect to the entanglement and sponsorship issues. See *Walz v. Tax Commission, supra*, 397 U.S. at 675; *id.* at 694 (Harlan J., concurring).

Indeed, to the extent that the use of tax benefits, rather than direct subsidies to the schools themselves, may insulate state action from condemnation as "sponsorship" of religion, see note 5, *supra*, the provisions at issue in this case fall short of the mark. More than 90% of the parents who qualify for the tax benefit under the New York statute do so as a result of paying at least \$50 tuition per child to a religious institution. Their maximum tax benefit is in the same amount, \$50 per child. Money, of course, is fungible and in substance the parent is a conduit for passing to the parochial school the \$50 which the State, but for the statute, would have collected from him. In short, there is no logical distinction between this tax benefit and the tuition reimbursement provisions of Part 2 which the district court found unconstitutional. As pointed out by Circuit Judge Hays in his dissenting opinion:

"There is no essential difference between a parent's receiving a \$50 *reimbursement* for tuition paid to a parochial school and his receiving a \$50 *benefit because* he sends his child to a parochial school. In both instances the money involved represents a charge upon the state for the purpose of religious education."

(J.S. 42a-43a, emphasis in original; 350 F. Supp. at 675.)

Tuition reimbursement is merely a way of providing the same economic benefit to less affluent persons that the tax benefit provides to the more affluent. In the only tuition reimbursement statute to come before this Court, the decision of a three-judge district court holding the statute violative of the Establishment Clause was affirmed. *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio), *aff'd*, 34 L.Ed.2d 69 (1972).

In sum, the difficulties encountered by the New York Legislature under the Establishment Clause inhere in the predominantly religious makeup of the State's nonpublic schools. The Legislature has sought to save the cost to the State of a public education for numbers of students by making their enrollment in nonpublic schools more attractive economically. Under the Establishment Clause, the State cannot go about this task in a manner which favors and promotes religious schools. Where 90% of the nonpublic schools are religious institutions, the State necessarily favors and promotes such institutions whenever it singles out nonpublic schools for support.

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed insofar as it upholds the constitutionality of Sections 3, 4 and 5 of Chapter 414 of the New York Laws, 1972.

Respectfully submitted,

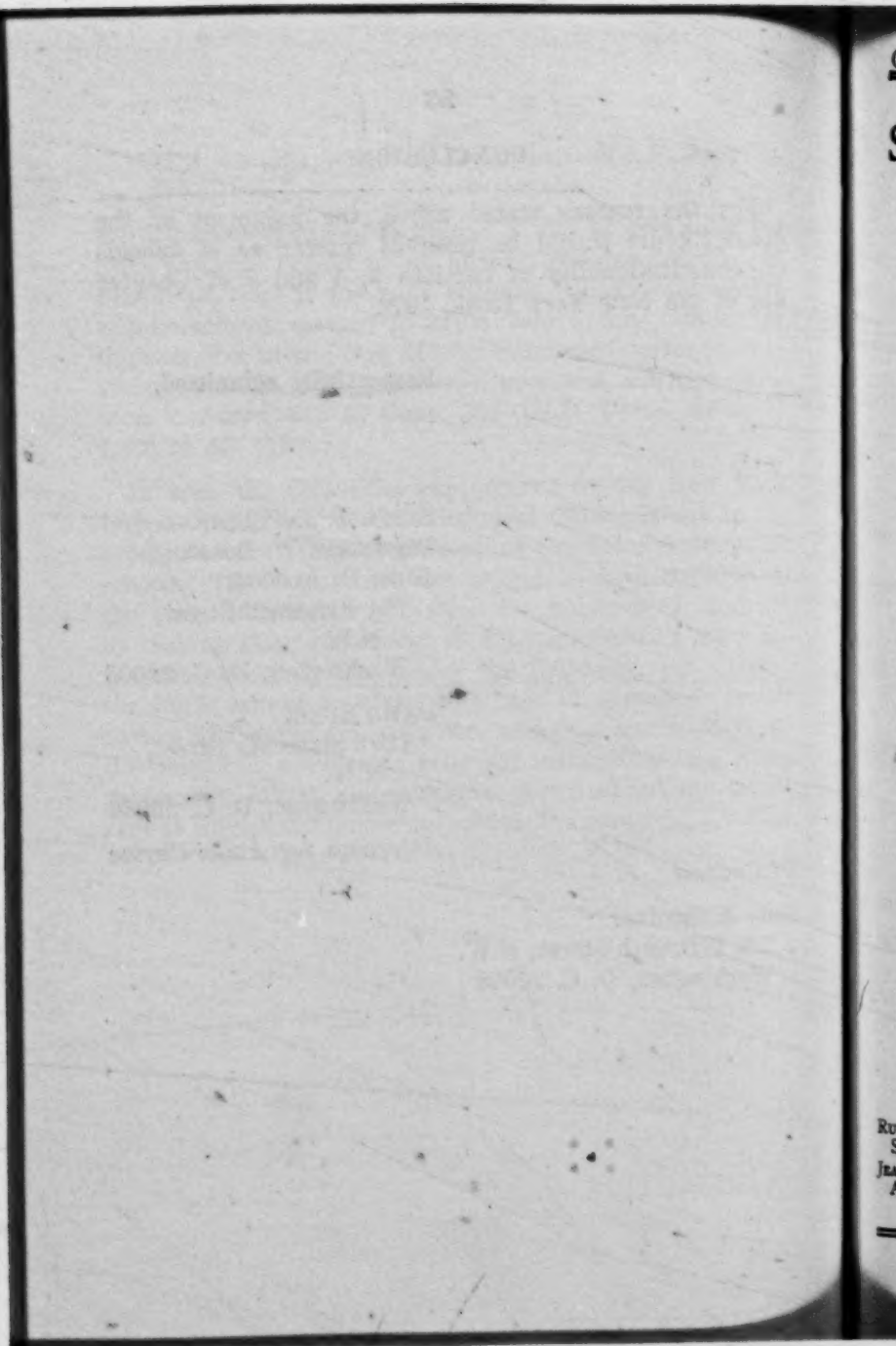
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Supreme Court
FILE

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IN THE
Supreme Court of the United States
MICHAEL ROBAK, J.

October Term, 1972

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS
LIBERTY, *et al.*, *Appellants*,

v.

EWALD B. NYQUIST, etc., *et al.*, *Appellees*.

WARREN M. ANDERSON, as Majority Leader and President
Pro Tem. of the New York State Senate, *Appellant*,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLEES-APPELLANTS NYQUIST,
LEVITT AND GALLMAN**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES-APPELLANTS NYQUIST,
LEVITT AND GALLMAN

Preliminary Statement

The order of this Court noting probable jurisdiction in No. 72-694, *Committee for Public Education and Religious Liberty v. Nyquist*; No. 72-753, *Brydges v. Committee for Public Education and Religious Liberty*; No. 72-791; *Nyquist v. Committee for Public Education and Religious Liberty*; and No. 72-929; *Cherry v. Committee for Public Education and Religious Liberty*, directed that the appeals be consolidated. By agreement among counsel, a single Appendix has been filed. Each party's brief will cover the issues in all the appeals, and the appellants in 72-694 will be deemed the appellants in the consolidated appeal. The appellants in No. 72-694 will hereinafter be referred to as appellants-appellees and the appellants in the other cases as appellees-appellants.

Citation to Opinions Below

The opinions of the United States District Court for the Southern District of New York are reported at 350 F. Supp. 655 (printed in Appendix to Jurisdictional Statement of Appellants Nyquist, Levitt and Gallman).

Jurisdiction

The appeals herein are from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened therein under 28 United States Code, §§ 2281 and 2284. The judgment holds chapter 414 of the New York Laws of 1972 to be constitutional and not to violate the Establishment Clause of the First Amendment to the Constitution of the United States insofar as it provides for a modification of adjusted gross income, for State income tax purposes, to tuition-paying parents of children

attending nonpublic schools. However, the judgment also holds chapter 414 to be in part unconstitutional on the ground that it violates the Establishment Clause of the First Amendment insofar as it provides for the payment of health and safety grants to nonpublic sectarian schools and provides for the reimbursement of a part of tuition paid to nonpublic schools by low-income parents, and enjoins the defendants Nyquist and Levitt from making payments under that chapter to nonpublic schools in the State or to low-income parents for tuition reimbursement.

The complaint sought declaratory and injunctive relief against the implementation of chapter 414, alleging that the statute violated the Establishment Clause by providing payments to sectarian nonpublic schools for operation and maintenance expenses necessary to protect the health and safety of children attending those schools, by providing for the reimbursement of a portion of tuition paid by low-income parents to nonpublic schools for the education of their children, and by providing for a modification of adjusted gross income, for State income tax purposes, to tuition-paying parents of children attending nonpublic school in the State.

The final judgment, granting in part the relief sought in the complaint, and dismissing the complaint as to the remainder, was made and entered October 20, 1972. Notice of appeal on behalf of the plaintiffs was filed on November 3, 1972 from that part of the judgment which held the modification of gross income provisions to be constitutional (a copy of which is printed in the Appendix to appellants-appellees Statement as to Jurisdiction). A notice of appeal was filed by defendants Nyquist, Levitt and Gallman on November 8, 1972, from all those parts of the judgment which held parts of chapter 414 unconstitutional and enjoined the implementation of those provisions (a copy of

which is printed in the Appendix to the Statement as to Jurisdiction on behalf of those appellees-appellants). Notices of appeal were also filed on behalf of intervenor-defendant parents of children enrolled in nonpublic schools from that part of the judgment relating to tuition reimbursements and by intervenor-defendant Brydges (for whom Senator Warren Anderson has been substituted) from that part of the judgment which held provisions of chapter 414 to be unconstitutional (copies of those notices of appeal are printed in the appendices to the respective Statements as to Jurisdiction on behalf of those appellees-appellants).

The appeals were docketed November 6, 22 and 29 and December 26, 1972, respectively. Probable jurisdiction was noted on January 22, 1973 and the appeals ordered consolidated for the purposes of argument.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United States Code, §§ 1253 and 2101(b).

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

"Congress shall make no law respecting an establishment of religion * * *."

The prohibition of that section has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States.

Chapter 414 of the New York Laws of 1972 is summarized herein as pertinent to this appeal (the full text is set out as an Appendix to this brief):

Section 1 of chapter 414 adds a new Article 12 to the New York State Education Law (McKinney's Consolidated Laws of New York, Book 16), providing for health and safety grants to nonpublic schools. The grants would be payable only to nonpublic schools which have been certified under Title IV of the Federal Higher Education Act of 1965 as serving a high concentration of pupils from low-income families. The grants, in the amount of \$30 per pupil plus an additional \$10 per pupil attending school in a building constructed prior to 1947, would be payable for maintenance and repair of nonpublic schools. The New York Legislature specifically found, in enacting this legislation, that these grants are necessary to protect the health, safety and welfare of children attending nonpublic schools, particularly those schools where the financial resources of the parents are not sufficient to adequately maintain the structures.

Section 2 of chapter 414 adds a new Article 12-A to the New York Education Law, providing an equal educational opportunity program. This Article provides for the reimbursement of parents, with a taxable annual income of less than \$5,000, for not more than 50% of the cost of tuition paid to a nonpublic school on behalf of their children. In so doing, the Legislature specifically found that the constitutionally guaranteed right of parents to select a nonpublic school education for their children is diminished or effectively denied to parents of low income who are unable to afford the tuition necessary to select such an education. In accordance with the State's established policy of providing for the economic and constitutional necessities of its low-income citizens, the New York Legislature enacted this article which provides for the reimbursement of a portion of the tuition paid by such parents.

The third portion of the statute (sections 3, 4 and 5 of the chapter) added a new subsection j to section 612 of the New York Tax Law, affording a modification of "adjusted gross income" to parents who pay nonpublic school tuition on behalf of their children. The parents' adjusted gross taxable income would be reduced by a fixed amount per child attending nonpublic school, based on a sliding scale under which the highest amount of modification of income would be attributable to persons with the lowest adjusted gross income.¹ Parents who claim tuition reimbursement pursuant to Article 12-A of the Education Law would not also be entitled to claim the modification of adjusted gross income here provided.

Additional provisions of chapter 414, which are not at issue in this action, provide additional state aid to school districts whose enrollment is substantially increased as a result of the closing of nonpublic schools and provide special provisions facilitating the purchase by public school districts of buildings of closed nonpublic schools.

¹ Modifications of adjusted gross income may be claimed by parents in accordance with the following scale for each dependent attending nonpublic elementary or secondary schools, up to a maximum of three such dependents:

If New York adjusted gross income is:	The amount Allowable for each dependent is:
Less than \$ 9,000	\$1,000
9,000—10,999	850
11,000—12,999	700
13,000—14,999	550
15,000—16,999	400
17,000—18,999	250
19,000—20,999	150
21,000—22,999	125
23,000—24,999	100
25,000 and over	-0-

Questions Presented for Review

1. Does the election by the Legislature, in the exercise of its sovereign power of taxation, to exclude from taxable income a portion of the income of *parents* paying tuition to nonpublic schools on behalf of their children attending such schools constitute the establishment of a religion or prohibited aid to religion, or does it, on the contrary, constitute a nonreviewable legislative exercise of the power of taxation?

2. Do grants to nonpublic schools for maintenance, repair and physical operation of those schools, in the exercise of the State's police power and for the specific purpose of protecting the health and safety of the children attending those schools, constitute an establishment of religion in violation of the First Amendment to the Constitution of the United States?

3. Are not the health and safety grants, so provided, a neutral form of aid similar to those forms of aid to nonpublic schools which have previously been approved by this Court?

4. Does not the partial reimbursement of tuition, paid by low-income parents to nonpublic schools on behalf of their children, constitute a valid State expenditure either for the purpose of guaranteeing to persons of low income the freedom to exercise their constitutionally protected right to select a nonpublic school education for their children or for the purpose of fulfilling the State's obligation to provide for the necessities of life and for access to constitutional rights to persons of low income?

Statement of the Case

On May 22, 1972, Governor Rockefeller signed into law an act which provides health and safety grants to nonpublic schools, reimbursement of tuition to low-income parents of children in nonpublic schools, a modification of adjusted gross income in computing state income taxes to parents of children in nonpublic schools, impact aid to public schools which have increased enrollment due to the closing of nonpublic schools, and provides for the financing of the purchase of nonpublic school buildings by public school districts where the nonpublic school has been closed (New York Laws of 1972, chapter 414).

Three days later, on May 25, 1972, plaintiffs commenced this action by filing the complaint in the United States District Court for the Southern District of New York, seeking to have sections 1, 2, 3, 4 and 5 of chapter 414 declared unconstitutional, alleging that those provisions violate the Establishment Clause of the First Amendment to the Constitution of the United States. The complaint also sought an injunction restraining payments of State funds in implementation of sections 1 and 2 of the act and restraining the implementation of the tax provisions of sections 3, 4 and 5 of the act.

A motion to intervene in the action was made by several parents of children enrolled in nonpublic schools and who would be the beneficiaries of the act. The motion was granted.

A motion to intervene was also made by Earl W. Brydges, the then Majority Leader and President *Pro Tem*. of the New York State Senate. That motion was also granted. Senator Warren Anderson, the present Majority Leader and President *Pro Tem*., has been substituted for Senator Brydges on this appeal.

Chapter 414 adds a new Article 12 to the New York Education Law, providing for health and safety grants to nonpublic schools. The grants would be payable only to nonpublic schools which have been certified under Title IV of the Federal Higher Education Act of 1965 as serving a high concentration of pupils from low-income families. The grants, in the amount of \$30 per pupil plus an additional \$10 per pupil attending school in a building constructed prior to 1947, would be payable for maintenance and repair of those nonpublic school buildings. The Legislature has specifically found, in enacting this legislation, that these grants are necessary to protect the health, safety and welfare of children attending nonpublic schools, particularly in those areas where the financial resources of the parents are not sufficient to adequately maintain the structures.

Chapter 414 also adds a new Article 12-A to the Education Law, providing an equal educational opportunity program. This Article provides for the reimbursement of parents, with a taxable income of \$5,000 or less, for not more than 50% of the cost of tuition paid to a nonpublic school on behalf of their children. In so doing, the Legislature specifically found that the constitutionally guaranteed right of parents to select a nonpublic school education for their children is diminished or effectively denied to parents of low-income who are unable to afford the tuition necessary to select such an education. In accordance with the State's established policy of providing for the economic and constitutional necessities of persons of low income, the Legislature enacted this article which provides for the reimbursement of a portion of tuition paid by such persons for the benefit of their children.

The third portion of the statute which is challenged in this action is subsection j of section 612 of the New York Tax Law, which affords a modification of "adjusted gross income" to parents who pay nonpublic school tuition. The parents' adjusted gross taxable income would be reduced by a fixed amount per child attending a nonpublic school, based on a sliding scale under which parents with the lowest incomes receive the greatest modification. Parents who claim tuition reimbursement pursuant to Article 12-A of the Education Law would not also be entitled to claim the modification of income here provided.

The District Court, in its decision, specifically held that it accepted the findings of the Legislature as to the purposes of each of the enactments, and that those findings sum up legislative purposes which are secular in intent. Thus, as relevant to this appeal, the Court expressly started with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas, with the assumption that the Legislature intended to provide an opportunity for a quality education for all children and to preserve a pluralistic society by providing money to poor parents for tuition payments to nonpublic schools for their children and intended to provide tax relief to parents of children attending nonpublic schools, at least partially in recognition of the fact that their support of tax exempt nonpublic schools relieves the taxpayers of additional costs of public education for these children.

Relying primarily upon the recent decisions of this Court in *Lemon v. Kurtzman* (403 U. S. 602 [1971]), *Tilton v. Richardson* (403 U. S. 672 [1971]), and *Walz v. Tax Commission* (397 U. S. 664 [1970]), the District Court held that public moneys may not be used for the repair or main-

tenance of nonpublic school buildings in which the religious and secular functions are combined. In response to the argument that repair and maintenance are neutral in character, not sectarian, the Court rejected the contention that nonpublic school budgets are divisible and held that subsidies of public moneys even for secular purposes, lighten sectarian school budget demands and make possible the diversion, to religious purposes, of funds which the schools would otherwise have had to expend for the upkeep of the physical plants of the schools. This latter result, the Court found, rendered the statute in violation of the First Amendment to the Constitution of the United States. The District Court also found that any money payment to the schools, for whatever purpose, was a relationship "pregnant with involvement" and invited excessive entanglement between government and religion. While the Court accepted the argument that the statute was an exercise of the State's police power, it held that that could not validate the statute where it was found to violate a provision of the Federal Constitution.

As to section 2 of the State statute, the District Court found that the parents receiving the money were only conduits for the payment of the money to the nonpublic schools in the form of tuition. Recognizing that the poor should have equal rights with the rich to practice their religions and that the conditions of rich and poor should be the responsibility of the particular religious denomination, not of the State. Nor did the Court find any support for the statute in the potential effect upon public education if nonpublic schools were to close in substantial numbers because of financial difficulties. The Court expressed a belief that support of nonpublic schools in any degree, based on such an argument, could lead to complete support of sectarian education by the State.

However, as to the provisions of the statute providing a modification of adjusted gross taxable income for income tax purposes, the majority of the Court found no constitutional violation. The Court based its finding of constitutionality on five grounds (Jurisdictional Statement, p. A27):

"In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools in the State. Second, it does not involve a subsidy or grant of money from the State Treasury as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. See *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the ongoing political activity as likely, in our opinion, to cause division on strictly religious lines."

The Court equated the modification of gross income provisions of this statute to the theory supporting the constitutionality of real property and income tax exemption of religious institutions and income tax deductions for contributions to religious bodies.

One member of the District Court (HAYS, Circuit Judge) dissented solely in relation to the holding of the majority that the modification of gross income provisions were constitutional. He would have found that the provisions of this part of the act also had the effect of subsidizing religion and would thus be unconstitutional.

Summary of Argument

No one will question that a State may not use tax money for the purpose of supporting religion. That, however, is not really the issue in this case. The District Court specifically found that each part of the statute at issue here enacts a secular legislative purpose, that is, provision of safe and healthful schools for children to attend, provision of equality of opportunity to exercise constitutional rights to low-income parents, and tax relief for parents who support both public and nonpublic schools.

In the implementation of its sovereign power to tax, the State has plenary power to select the objects of taxation. It may select what income to tax and how much to tax it. The State may provide for deductions from gross income for income tax purposes in any manner or degree which it sees fit. This is an inherent attribute of the power to tax, and the exercise of that power raises no issue of constitutional violation. Additionally, as the District Court found, the modification of adjusted gross income at issue here is similar to real property tax exemption or deductions for contributions—it does not act as an unconstitutional subsidy to religion. The benefits to religion, in the case of the modification of adjusted gross income here provided, are so remote as to create no constitutional issue.

In the case of the health and safety grants to nonpublic schools, the New York Legislature has found, and the District Court accepted those findings, that the financial crisis of nonpublic schools in low-income areas has resulted in a diminution in proper repair and maintenance of the school buildings and has endangered the health and safety of the children attending those schools. The issue presented in this appeal is whether the State, in the exercise

of its police power, to protect the health and safety of its children may provide payments to the nonpublic schools in low-income areas which partially reimburse the schools for operation and maintenance costs necessary to maintain adequate standards of health and safety. The moneys are not provided for the teaching function of the schools, but rather for structural maintenance for a specific police power purpose. This Court has in the past rejected the argument that payments which lighten the burden of the nonpublic schools budget and thus release moneys for sectarian purposes are thereby rendered unconstitutional. Yet that argument was relied upon by the Court below in this case. This Court has also held that the State may constitutionally provide "neutral and nonideological" services to nonpublic schools. The appellees-appellants here argue that the provision of health and safety grants to nonpublic schools are "neutral and nonideological" and are constitutional, and a valid exercise of the State's police power.

The provision of tuition reimbursement to low-income parents of children enrolled in nonpublic schools is the State's attempt to reconcile two constitutional principles. This Court has held that parents have a constitutional right to select a nonpublic school education for their children, a right which cannot be taken away from them by the State. There has also developed, in recent years, a body of law which holds that persons may not be denied the exercise of their constitutional rights by virtue of their inability to pay the cost of those rights. The States have been required to provide free counsel to indigents in criminal cases, to provide free transcripts to indigents for the purpose of criminal appeals, to provide the right to vote free of the obligation to pay poll taxes, and to provide access to the Courts free of State-imposed costs in some civil

cases. Further, the State and Federal government have both accepted the obligation to provide for the economic necessities of life for the poor. In enacting the tuition reimbursement provisions at issue here, the Legislature found that the right of low-income parents to select a nonpublic school education for their children was diminished or denied by virtue of their inability to pay tuition costs. In order to protect the constitutional right of such parents to equal educational opportunity for their children, the New York Legislature adopted this statute which would partially reimburse them for tuition paid to nonpublic schools. Not all parents are so reimbursed, solely those whose low income level operates to exclude them from rights available to those with greater wealth. Here too the payments are not made to the schools, and have only a remote benefit to those schools.

In all of the portions of the bill under attack in this proceeding, the New York Legislature sought to advance secular purposes and not to aid religion. The purpose and primary effect of all these proposals was secular and they do not result in an excessive entanglement between Church and State.

ARGUMENT.**I.**

A state statute which authorizes a modification of adjusted gross income for parents paying nonpublic school tuition for their children is an exercise of the sovereign power of the State to enact tax statutes and does not infringe upon the Establishment Clause of the First Amendment to the Constitution of the United States.

The New York State Constitution, Article III, § 22 establishes the powers of the State Legislature in the enactment of income tax legislation. That section provides that the Legislature, in imposing any tax to be measured by income, may define the measure of the income to be taxed, and may prescribe exceptions to and modifications of any such provision at any time.

New York Tax Law, § 612(a) provides that the New York adjusted gross income of a resident individual means his Federal adjusted gross income as defined by the laws of the United States, less a number of modifications. Generally, deductions and exemptions from gross income, in determining State net taxable income, are the same as those used in determining Federal net taxable income. There are, however, additions and modifications which are provided solely in State law. For example, a deduction is not allowed on State returns for income taxes paid to the State although it is allowed on Federal returns, and deductions for life insurance premiums are allowed on State returns although not on Federal.

The addition of new subsection j to Section 612 of the Tax Law, by chapter 414 of the Laws of 1972, was no more and no less than an exercise of the State's inherent power

to determine the measure of personal income subject to taxation by the State. That new subsection adds a provision for modification of adjusted gross income, in determining net taxable income, for those parents who pay tuition for their children attending nonpublic schools.

The provision sets up the modification as a sliding-scale amount deductible from gross income for every child, not exceeding three, attending nonpublic schools. The fixed amount varies, depending upon gross income of the parents, with the largest modification available to those with the lowest incomes. A parent with a taxable income less than \$5,000 must elect either the modification of adjusted gross income or tuition reimbursement provided by Education Law, Article 12-A, and may not obtain the benefits of both provisions.

This Court has recognized that it is an inherent attribute of the states to be free, in the normal exercise of the power to tax, to select the subjects of taxation and to grant exemptions, and that inequalities which may result from singling out of one particular class for taxation or exemption from taxation infringe upon no constitutional rights or limitations, so long as they have a rational basis (*Carmichael v. So. Coal Co.*, 301 U. S. 495 [1937]; *People ex rel. Moffet v. Bates*, 276 App. Div. 38, affd. 301 N. Y. 597, cert. den., 340 U. S. 865 [1950]).

The history of the taxing power of the United States clearly bears out that conclusion. In *The Federalist*, Alexander Hamilton described the taxing power conferred by the Constitution upon the Federal government to be "a concurrent and coequal authority in the United States, and in the individual states" (*The Federalist*, No. XXXII). From the prohibition contained in the proposed Constitu-

tion of the United States, restraining the states from the imposition of duties on imports and exports, Hamilton concluded that the power of the states was so plenary that except for the express prohibition the states would have had the inherent power to impose such duties.

Since those powers of taxation are coequal, the decisions of this Court relating to the Federal government's powers in relation to the taxation of income also apply with equal force to the powers of the States.

In *Sonzinsky v. United States* (300 U. S. 506 [1937]), this Court clearly stated the principle of taxation which we contend is controlling in this case, stating (p. 512):

"In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others."

and in *Fernandez v. Wiener* (326 U. S. 340 [1945]), both as to the power of Congress and the states, this Court stated (pp. 351-352):

"It is a revenue measure enacted in the exercise of the federal power to lay and collect an excise. Congress has a wide latitude in the selection of objects of taxation, *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 12; *Steward Machine Co. v. Davis*, 301 U. S. 548, 581, and even under the equal protection clause of the Fourteenth Amendment, which was not included in the Fifth, the states may distinguish, for purposes of transfer taxes, between property which has borne its fair share of the tax burdens and similar or like property passing to the same class of beneficiaries which has not."

and further held that Congress has the power to select and classify the subjects of taxation (p. 361). (See also, *Commissioner v. Jacobson*, 336 U. S. 28 [1949].)

In the *Brushaber* case, cited in the *Fernandez* opinion, *supra*, this Court held the income tax laws constitutional in the face of specific objections to the taxation of different classes of income and the allowance of different deductions to different taxpayers (see also, *Stanton v. Baltic Mining Co.*, 240 U. S. 103 [1916]).

The New York Legislature, therefore, has the power, in enacting tax legislation, to select what income and how much of income it wishes to tax and to provide for deductions from taxable income in any amount or for whatever purpose it deems advisable. In enacting subsection j of section 612 of the New York Tax Law, the Legislature of the State of New York did precisely that. It elected to provide a deduction from gross income to parents paying tuition on behalf of their children to nonpublic schools in the State. This was clearly within the power of the Legislature to do.

The District Court equated the deduction from gross income provided in subsection j with real property tax exemption of church property and deduction of contributions to churches from taxable income. In this respect, this Court has itself held that the property of sectarian institutions may constitutionally be exempted from taxation (*Walz v. Tax Commission*, 397 U. S. 664 [1970]) as cited by the District Court in the instant case. In so doing, this Court stated (p. 678):

"Nothing in this national attitude toward religious toleration and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion, and on the contrary it has operated affirmatively to help guarantee the free exercise of all religious beliefs. Thus it is hardly useful to suggest that tax exemption is but the 'foot in the door' . . . leading to an established church."

In addition to the exemptions from property and income taxation provided to nonpublic educational institutions, both sectarian and secular, State and Federal tax laws both provide for deductions from individual income for contributions made to such institutions and for job related education costs paid to such institutions, regardless of their nature as sectarian or secular.

As the District Court pointed out in the instant case, tax exemption of the property and incomes of sectarian institutions and the authorization of deductions from gross income of contributions given to such institutions constitute a benefit, albeit remote, to religion through the sectarian institutions. In each case, however, such tax exemption or such deduction has been allowed and held not to constitute a violation of the Establishment Clause.

The argument was made by plaintiffs in the District Court that the distinction between contributions and tuition payments lies in the unrestricted nature of the contribution, the lack of a *quid pro quo*, and the motive behind the payment. Of course, as the District Court stated those considerations would be relevant only in construction of the Federal revenue statute; they are not constitutional limitations or requirements. Absence of benefit or *quid pro quo* is also, however, not even a uniform statutory requirement. In *Citizens & Southern National Bank v. United States* (243 F. Supp. 900 [W. D. So. Carolina, 1965]) and *Crosby Valve & Gage Co. v. Commissioner* (380 F. 2d 146 [1st Cir., 1967], cert. den. 399 U.S. 976), the Courts recognized that contributions have many motives, including personal benefit. As to motive, the Court in *Crosby Valve* stated (380 F. 2d p. 146):

"Were the deductibility of a contribution under section 170(c) of the Internal Revenue Code of 1954 to depend on 'detached and disinterested generosity', an important area of tax law would become a mare's nest of uncertainty woven of judicial value judgments irrelevant to eleemosynary reality. Community good will, the desire to avoid community bad will, public pressures of other kinds, tax avoidance, prestige conscience-salving, a vindictive desire to prevent relatives from inheriting family wealth—these are only some of the motives which may lie close to the heart, or so-called heart, of one who gives to a charity."

Furthermore, as pointed out, expenses for job related education are deductible from income for tax purposes. In that case, there is a direct benefit to the payer, a *quid pro quo* has been received without affecting deductibility. Here too, the Legislature had the power to exempt a portion of a tuition-paying parent's income from taxation without infringing upon any constitutional prohibitions.

The modification of adjusted gross income provision also meet the intent and effect tests set forth in the *Schempp* case (*Abington School District v. Schempp*, 374 U.S. 203 [1963]). The purpose of this statute was to provide tax relief to tuition-paying parents of children in nonpublic schools, based in part upon the fact that their continued support of those schools relieves the taxpayers from the support of additional children in public schools. The primary effect, as found by the District Court, would not be aid to the nonpublic schools, but rather aid to the parents. The District Court stated that the financial benefit to the parents would most likely not be paid over to the nonpublic schools as additional contributions but would rather be used for the personal advantage of the parent.

It is submitted that subsection j of section 612 of the Tax Law is no more than a State recognition that the cost of nonpublic school tuition is an expense to taxpayers which should be considered in determining their tax liability. It is a recognition that the selection by those taxpayers of a nonpublic school education for their children has reduced the tax burden of those who support public education and that that secular contribution to the public should be recognized.

The purpose and primary effect of subsection j is the purely secular one of relieving a portion of the tax burden of parents of nonpublic school children. The section does not provide for payment of money directly to the schools but merely recognizes the financial burden of parents of nonpublic school children. Additionally, there is no entanglement, excessive or otherwise, between the State and religion as a result of this amendment to the New York Tax Law, because there is no contact whatsoever provided therein between sectarian institutions and the State.

Thus, it is submitted, subsection j of section 612 of the Tax Law infringes upon no constitutional rights of the plaintiffs, nor upon any provision of the Constitution itself.

II.

Article 12 of the New York Education Law, as added by Chapter 414 of the Laws of 1972, is a valid exercise of the police power of the State and does not infringe upon the First Amendment to the Constitution of the United States.

Article 12 of the Education Law, which provides health, welfare and safety grants to nonpublic schools for maintenance, repair and physical operation of those schools, was enacted for the express purpose of protecting the health and safety of the children attending those schools. In enacting that Article, as part of Chapter 414 of the Laws of 1972, the Legislature specifically made a finding in the act that the State has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools. It recognized that that objective is met in the case of public school children through grants of State aid and through municipal taxing power. The Legislature further specifically found that the fiscal crisis in nonpublic education has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of children attending those schools, particularly in urban areas; that nonpublic schools in low income areas are characterized by deteriorating physical structures; and that the parents of children enrolled in those nonpublic schools do not have the financial resources necessary to maintain the structures. The Legislature concluded that the State has the right and obligation to ensure that the physical environment in nonpublic schools in those low-income areas is both healthful and safe. Except for the conclusions as to constitutionality, the District Court found that the purposes of the act were as stated and were secular in interest.

In order to meet the objective of safe and healthful buildings for nonpublic school children, the Legislature has provided in this statute for grants for maintenance, repair and operation of buildings. Those grants amount to a maximum of \$30 per pupil, increased by an additional \$10 per pupil attending classes in a building constructed prior to 1947. The grants are limited to not more than 50% of the average statewide per pupil cost of maintenance and repair in public schools, and may not exceed the amount actually expended by the nonpublic school for maintenance, repair and operation in the preceding base year, as certified by a required audited statement of expenditures.

Not all nonpublic schools will qualify for grants under this act. Only those schools will qualify which have been certified as serving a high concentration of low income pupils for the purposes of Title IV of the Federal Higher Education Act of 1965 (20 U. S. C. A. § 425).² Thus, only a small percentage of the total number of nonpublic schools will be eligible for these grants.

While, of course, the extent of the First Amendment's application to present-day statutes is not limited to the concepts of the drafters of the Amendment, the meaning which they ascribed to it has been considered in depth by this Court in applying it to current situations (see *e.g.*, *Everson v. Board of Education*, 330 U. S. 1 [1947]; *Abington School District v. Schempp*, *supra*).

When the early settlers came to this country from Europe, they brought with them, not only political and social customs, but also many of the religious problems

² Title IV of the Federal Higher Education Act of 1965 provides that a portion of moneys borrowed to secure education will be forgiven to any borrower who teaches in a school serving a high concentration of children from low income families.

which were indigenous to their countries of origin. In Europe there were religions established and supported by government, a factor which engendered many of the emigrations which founded the United States. Persecution in the name of religion drove the colonists from Europe to America. But those same practices were transplanted to the New World and, at the time of the adoption of the Constitution and the Bill of Rights, there were established churches in a majority of the original Thirteen Colonies and almost every colony exacted some kind of tax for church support. In the language of the opinion of this Court in the *Everson* case, 330 U. S., p. 11:

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment."

Consequently, the original and prime intent of the First Amendment was to prohibit the direct establishment of a national church and to further prohibit the direct support of any one religion or of all religions.

But what of statutes and government actions other than direct establishment? While not a member of the Congress which adopted the Bill of Rights, Thomas Jefferson is considered as a spokesman for the anti-establishment movement. It was he who first used the phrase "a wall of separation between church and state" in his letter to the Danbury Baptists in reply to their address of congratulation and good wishes upon his becoming President of the United States. That Jefferson did not consider this "wall" to bar all relations between government and religion is clear from both his actions and subsequent writings. Thomas

Jefferson was President of the United States for 8 years, during which time Federal funds were used to aid religion in various ways without protest from the President. Federal funds were used to support missionaries to Christianize and civilize the Indians. The chaplain service for the Army and Navy had been established long before Jefferson became President and was continued under Jefferson. Probably Jefferson's most specific statement in regard to the relation of government to religion is found in a statement made in 1822, after he had left the presidency, concerning freedom of religion at the University of Virginia, of which he was one of the founders. In his report as Rector, Mr. Jefferson stated:³

"The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. * * * A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit of the public provisions made for instruction in the other branches of science. * * * It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University * * *. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected * * * or in the lecturing room of such professor."

³ 19 The Writings of Thomas Jefferson (Memorial Edition, 1904) 414 *et seq.*, quoted in *McCullum v. Board of Education*, 333 U. S. 203, 245-246 (1948).

Jefferson, therefore, saw no breach in the "wall of separation" resulting from nonpreferential aid to sectarian students.

Next to Jefferson, Madison ranks as probably the most significant spokesman on the meaning of the First Amendment. Possibly he should even be given foremost status since he was primarily responsible for the language of the Amendment. On June 8, 1789, Madison in the First Congress stated that his understanding of the meaning of the Amendment was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."⁴ In his *Detached Memoranda*, written some time after 1817, Madison wrote that the people of the United States "have the noble merit of first unshackling the conscience from persecuting laws and of establishing among religious sects a legal equality."

Madison also was President of the United States for 8 years, during which time Federal funds supported military chaplaincies and missionaries to the Indians without criticism from the President.

Surely we can find no support in the writings and opinions of the formulators of and spokesmen for the First Amendment for the argument that public aid to children regardless of their religion constitutes an establishment of religion. Nor can any support be found for that proposition in the total record of the Presidents or the Congress.

As previously stated, Federal funds for missionaries to the Indians were first paid under Washington and continued until 1900 when changed conditions on the reservations, not

⁴ 1 Annals of Congress 729-731 (Benton ed. 1858).

constitutional problems, resulted in a change in the system. The First and Third Congresses, also under Washington, created the military chaplaincies for which Federal funds are still being paid. Under every Congress there have been chaplains in the House and Senate and in Federal institutions, such as hospitals and correctional institutions, and religious services are held at the United States military academies. Sectarian property and income is tax exempt; clergymen and divinity students have been made exempt from the draft, as are conscientious objectors; the Bible is used for administering of oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act.⁵

Many other Federal statutes have provided nondiscriminatory aid to students attending public and nonpublic schools, both directly and through the institutions they attend. Among these are the National School Lunch Act,⁶ free milk under the Agriculture Act of 1949,⁷ the National Defense Education Act of 1958,⁸ College Housing Act of 1950,⁹ the Higher Education Facilities Act,¹⁰ the Higher Education Act,¹¹ the Elementary and Secondary Education

⁵ Hill-Burton Act of 1946, 60 Stat. 1040, 42 U. S. C. §§ 29-92; see also *Bradfield v. Roberts*, 175 U. S. 291 (1899).

⁶ 60 Stat. 230 (1946), 42 U. S. C. § 1751.

⁷ 63 Stat. 1051 (1949), 7 U. S. C. § 1431.

⁸ 72 Stat. 1580 (1958), 20 U. S. C. §§ 401-589.

⁹ 12 U. S. C. §§ 1749-1749c.

¹⁰ 77 Stat. 363 (1963), 20 U. S. C. §§ 701-757.

¹¹ 79 Stat. 1219 (1965), 20 U. S. C. §§ 1001-1144.

Act,¹² the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations,¹³ and the G. I. Bill of Rights.¹⁴

From this listing we must assume that either the Congress and the Presidents have been totally wrong under the Constitution or that the First Amendment prohibition of an establishment of religion does not bar nonpreferential aid to all schools, all pupils, or all institutions, regardless of their religious affiliation (See, also, *Protestants and Other Americans United v. Essex*, 28 Ohio St. 2d 79, 275 N. E. 2d 603 [Nov. 24, 1971]).

It is submitted, however, that the statute here at issue is not directed to the aid of religion or religious institutions, but rather is a measure, adopted in the exercise of the State's police power, to secure the health and safety of its children; a fact found by the District Court in this case.

In a case involving a tax exemption for railroads (a different factual situation), this Court clearly expressed the rules of construction utilized in evaluating attacks upon the constitutionality of statutes (*Williams v. Mayor and City Council of Baltimore*, 289 U. S. 36 [1933]). In that case, the Court stated (p. 42):

"It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. . . . The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and

¹² 79 Stat. 27 (1965), 20 U. S. C. §§ 236-244, 331-332.

¹³ 58 Stat. 765 (1944), 40 U. S. C. §§ 484(j) and 484(k); 107 Cong. Rec. 17351.

¹⁴ 66 Stat. 663 (1952), 38 U. S. C. § 911.

fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way. * * * Nor in marking out that field will a court be forgetful of presumptions that help to fix the boundaries. 'As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.' *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, 257."

The New York Court of Appeals cited the above case and quoted from it in rejecting an attack on a health statute (*Grossman v. Baumgartner*, 17 N Y 2d 345 [1966]), holding (p. 350) that the "police power is exceedingly broad" and that "the courts will not substitute their own judgment of a public health problem."

In *Jacobson v. Massachusetts* (197 U. S. 11 [1905]), Mr. Justice HARLAN, discussed the extent of the State's police power, observing (pp. 24-25):

"The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this Court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." (Emphasis added.)

And in *City of El Paso v. Simmons* (379 U. S. 497 [1965]), this Court clearly expounded the broad powers of state legislatures in police power legislation, holding (p. 508):

"The State has the 'sovereign right . . . to protect the . . . general welfare of the people . . .'. Once we are in this domain of the reserve power of the State, we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary.'"

While the cases above cited dealt with statutes different in specific scope and purpose from the statute here at issue, they are all alike in one respect, that is, they deal with questions of public health and safety. Here too, there is a distinction that in those cases, the questions were of restrictive regulation, rather than the expenditure of public funds. However, there is no essential difference in the scope of the police power between police power regulations which restrict and police power legislation which expends money to accomplish a health and safety purpose.

This identity of result was recognized by this Court in *Everson, supra*. In that case, the Court approved the expenditure of public funds to provide school bus transportation for children attending nonpublic schools, in part at least, as an exercise of the State's police power. In considering whether the providing of bus transportation served a valid secular purpose, this Court stated (p. 7):

"It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose . . .'. The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or hitchhiking'."

Again, with reference to the purpose of the New Jersey legislation there at issue, the Court stated (p. 18):

"Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

It would be an anomaly if the State could provide for the safety of children in reaching the doors of the nonpublic schools, but could not guard them against hazards to their health and safety once they enter those doors. The statute here involved, in providing for the physical safety of the school buildings in which children attend classes, is no less a valid exercise of the State's police power than is the providing of school bus transportation, or health services to nonpublic school children.

It should also be noted that, in approving a Federal statute providing for the cost of construction of new buildings at all private colleges, including sectarian colleges, this Court in the *Tilton* case approved more extensive legislation than the statute here at issue, which provides only for a partial reimbursement of the costs of physical repair and maintenance of only a small percentage of the nonpublic school buildings in the State (*Tilton v. Richardson*, 403 U. S. 672 [1971]). In the *Tilton* and *Lemon* cases (*Tilton v. Richardson*, *supra*; *Lemon v. Kurtzman*, 403 U. S. 602 [1971]), this Court reiterated the tests for determining whether a statute infringes upon the First Amendment prohibitions against laws which establish religion. The tests, as stated in that decision and others, is whether there is a secular purpose and a primary effect which neither advances nor inhibits religion and whether there is excessive entanglement between the State and religion as a result of the legislation. Here the purpose and primary effect is clearly the provision of a healthful and safe

environment for children attending nonpublic schools, just as the State assures the same environment to children attending public schools.

The Courts have consistently said that the mere fact that a public program makes it easier for children to attend nonpublic schools does not make it a program which is directed to the aid of religion or which has a primary effect of aiding religion (*Everson v. Board of Education*, *supra*; *Board of Education v. Allen*, 392 U. S. 236 [1968]). Nor does a statute which provides for a flat grant, restricted to an amount no greater than the actual costs of maintenance and repair, result in excessive entanglement or result in a need for continued surveillance.

The *Tilton* Court itself observed that "The entanglement between church and state is also lessened here by the non-ideological character of the aid which the government provides." In *Lemon*, this Court commented (pp. 616-617):

"Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

And again, in *Tilton*, the Court rejected any theory that all financial aid to sectarian institutions was constitutionally prohibited, stating (p. 679):

"The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U. S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious

purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all give aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld."

In the instant case, the aid involved is secular, neutral and nonideological. It provides for the cost of repair and maintenance of school buildings in areas which serve a high concentration of low income pupils, where presumably the parents of those children are unable to bear the costs of maintenance, particularly of older structures.

Although compensation of the schools for these non-ideological costs might free other money of the schools so that it could be used to advance the sectarian mission of the schools, that is not a ground for invalidation of the act as this Court stated in *Tilton*, as quoted above.

Article 12 of the New York Education Law, as added by Chapter 414 of the Laws of 1972, is, we submit, a valid exercise of the State's police power to protect the health, welfare and safety of its children and is, therefore, not constitutionally invalid under the First Amendment to the Constitution of the United States.

III.

Article 12-A of the New York Education Law, as added by chapter 414 of the Laws of 1972, is a valid exercise of the State's power and responsibility to protect the constitutionally guaranteed right of parents to select their children's education and to insure to low-income parents their ability to exercise those rights.

New Article 12-A of the New York Education Law provides for the reimbursement by the State of a portion of the tuition paid to nonpublic schools by parents whose State net taxable income is less than \$5,000 per year. Tuition reimbursement will be paid in an amount equal to the lesser of 50% of tuition paid or \$5 per month per pupil attending elementary school and \$10 per month per pupil attending a secondary school. Thus, the maximum amount of reimbursement payable on behalf of a child is \$50 for an elementary school pupil or \$100 for a secondary school pupil.

Initially, it should be noted here that this statute differs in one significant respect from the statutes at issue in the *Wolman* and *Sloan* cases, (*Wolman v. Essex*, 342 F. Supp. 399 [S. D. Ohio, aff'd 34 L. Ed. 2d 69; 1972]; *Lemon v. Sloan*, 340 F. Supp. 1356 [E. D. Pa. 1972 prob. juris. noted January 22, 1973]. The statutes of Ohio and Pennsylvania, at issue in those cases, provided tuition reimbursement to all parents of children attending nonpublic schools, whereas the New York statute here provides for reimbursement only to low-income parents. This distinction, and the legislative findings in support of the act, are, we submit, decisive in support of constitutionality of this statute.

In enacting Article 12-A, the Legislature of the State of New York specifically recognized that parents have a con-

stitutional right to satisfy a state's compulsory attendance laws by selecting either a public or nonpublic school education for their children, including a sectarian education. The Legislature further found that that constitutional right is diminished or even denied to children of lower income families; and that the State has a right to make provision so that such families and their children are not excluded from the exercise of their constitutional right of selection because of their inability to pay the cost of a nonpublic school education.

Article 12-A is the State's attempt to meet that objective of assuring that its citizens are not excluded from a constitutionally secured right solely because of inability to meet the cost of that right.

The Legislature's findings in relation to constitutional rights and obligations were not carved out of thin air. They have a solid foundation in the decisions of this Court.

In *Pierce v. Society of Sisters* (268 U. S. 510 [1925]), this Court held that a State may not require all children to attend public schools, and that parents have a constitutionally guaranteed right to satisfy a State's compulsory attendance laws by selecting either a public or nonpublic school education, including a sectarian education. This is the very right which New York here seeks to protect.

This Court has also held that a citizen's access to the exercise of a constitutional right cannot be denied or withheld because of his inability to pay for the exercise of that right (see, e.g., *Boddie v. Connecticut*, 401 U. S. 371 [1971]—access to Courts; *Harper v. Virginia State Board of Elections*, 383 U. S. 663 [1966]—right to vote; *Gideon v. Wainwright*, 372 U. S. 335 [1963]—right to counsel).

In *Boddie*, in which the Court held that access to the judicial process could not be denied due to inability to pay court costs, Mr. Justice DOUGLAS in his concurring opinion stated (p. 383):

"Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant are repugnant to the Constitution."

In *Harper*, the Court invalidated a poll tax as a condition precedent to the exercise of the right to vote, holding that the elective franchise may not be withheld because of a voter's inability to pay a poll tax.

Additionally, the State and Federal governments have both recognized a responsibility toward the support of indigents, both as to the necessities of life and access to constitutional rights. The social welfare system itself is a recognition of that responsibility, as is the provision of free legal counsel to indigents in both civil and criminal cases, and as is free health care, the school lunch program, and similar programs and services.

New York's provision for partial tuition reimbursement is reasonably calculated to enable low-income parents to secure effective access to their constitutional right to select a nonpublic school education for their children. It is submitted that the State has the power to reimburse those who would be denied their rights because of their inability to pay the costs of tuition.

It is further submitted that this program also meets the criteria set by this Court relative to the constitutionality of statutes which may provide incidental aid to sectarian institutions. Article 12-A has a secular purpose: that is,

securing of the constitutional rights of low-income citizens. Its primary effect is not to aid or inhibit religion but rather to aid those same low-income citizens in securing their choice of education for their children. The fact that there may also be some indirect benefit to the nonpublic schools does not alone, as this Court held in the *Board of Education v. Allen*, *supra*, "demonstrate an unconstitutional degree of support for a religious institution". Finally, reimbursement to *parents* of a portion of tuition which *they* have paid does not result in an excessive entanglement between the State and the *schools*. There is, in fact, no contact whatsoever between the two which could result in any entanglement.

It is, therefore, submitted that Article 12-A of the New York Education Law, as added by chapter 414 of the Laws of 1972, is constitutional and valid in all respects.

IV.

All parts of chapter 414 are severable.

The provisions of chapter 414 are separable because it was clearly the intention of the Legislature, as expressed in the legislative intent clauses of the act, to provide five separate and distinct proposals for the aid of children enrolled in nonpublic schools, for their parents and for public schools suffering from the impact of the closing of nonpublic schools. Additionally, chapter 414 contains a specific severability clause (Section 11). The District Court majority, relying upon this Court's decisions in *Tilton* (403 U. S. at 683-84), and *Champlin Refining Co. v. Corporation Commission of Oklahoma* (286 U. S. 210, 234 [1932]), held sections 3-5 of chapter 414 to be separable from sections 1 and 2 (and 6-10). Indeed, each of the sub-

stantive parts of the statute stands alone and could have been enacted as a separate law without modification. Then again, even if the parts of a given statute are not independent of each other, as was true in *Tilton*, "[t]he cardinal principle of statutory construction is to save and not to destroy". *NLRB v. Jones & Laughlin Steel Corp.* (301 U. S. 1, 30 [1937]).

The principle of separability under New York law was clearly stated by the Appellate Division of the New York Supreme Court, Second Department, in *DiPaola v. Reilly* (22 A D 2d 910 [1964]) when it stated (pp. 910-911):

"As Chief Judge CARDOZO observed in *People v. Mancuso* (255 N. Y. 463, 474): '“The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether”'. In determining the separability of a statute, the test is two fold: the Legislature must have intended that the act be separable; and the act must be capable of separation, in fact (2 Sutherland, Statutes and Statutory Construction [3d ed.] § 2404). The inclusion of a separability clause raises a presumption that the Legislature intended the act to be divisible (*Williams v. Standard Oil Company*, 278 U. S. 235, 242)."

Again, the New York Court of Appeals stated in *People ex rel. Alpha Portland Cement Co. v. Knapp* (230 N. Y. 48, 60 [1920]):

"Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment (*Loeb v. Columbia Township Trustees, supra*). The principle of division is not a principle of form. It is a principle of function. * * * The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots."

Here the statute includes a separability clause, raising a presumption of separability. Functionally, the statute is divisible, each part can stand on its own without the others.

In view of the express intent of the Legislature there can be no valid issue as to separability.

CONCLUSION

Sections 1 through 5 of chapter 414 of the New York Laws of 1972 are constitutional in all respects, and the District Court's judgment with respect to sections 3, 4 and 5 should therefore be affirmed and the judgment with regard to sections 1 and 2 should therefore be reversed.

Dated: March 19, 1973.

Respectfully submitted,

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APPENDIX

Chapter 414, Laws 1972

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, with an immediate effective date, except that sections 7, 8 and 9 were effective July 1, 1972.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12

**HEALTH AND SAFETY GRANTS FOR NONPUBLIC
SCHOOL CHILDREN**

Section 549. Legislative findings.

550. Definitions.

551. Apportionment.

552. Applications, reports, regulations.

553. Installments.

§549. Legislative findings. The legislative hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

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2. The state discharges this responsibility to public school children through substantial amounts of per public financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five, which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but non the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

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§ 550. *Definitions. In this article:*

1. "Commissioner" shall mean the state commissioner of education.
2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000 (d), (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).
3. "Base year" shall mean the school year immediately preceding the current year.
4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.
5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

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6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session during such year.

§ 551. Apportionment. 1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

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2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 552. Applications, reports, regulations. Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. Installments. The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July

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first, nineteen hundred seventy-one such apportionment shall be made in one payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A to read as follows:

ARTICLE 12-A

ELEMENTARY AND SECONDARY EDUCATION
OPPORTUNITY PROGRAM

Section 559. Legislative findings.

560. Short title.

561. Definitions.

*562. Tuition reimbursement payments
to parents.*

563. Commissioner; powers.

§ 559. *Legislative findings. The legislative hereby finds and declares that:*

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

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2. *The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.*

3. *Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.*

4. *In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.*

5. *An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition reimbursement for parents of low income, in order to provide partial assistance in meeting the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.*

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§ 560. *Short title.* This article shall be known as the "Elementary and Secondary Education Opportunity Program".

§ 561. *Definitions.* The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred

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four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000 (d), and (iii) which is entitled to a law exemption under section five hundred one (a) and five hundred one(c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar year exclusive of July and August.

§ 562. Tuition reimbursement payments to parents. 1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one

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through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified

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statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.

§ 563. Commissioner; powers. The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.
2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

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3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) *The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.*

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subsection (j), to read as follows:

(j) *Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades*

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one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragraph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

If New York
adjusted gross
income is:

The amount
allowable for each
dependent is:

Less than \$9,000	\$1,000
9,000—10,999	850
11,000—12,999	700
13,000—14,999	550
15,000—16,999	400
17,000—18,999	250
19,000—20,000	150
21,000—22,999	125
23,000—24,999	100
25,000 and over	-0-

(2) *Husband and wife.* In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

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(3) *Definitions.* (A) "Tuition", as used in this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252,42 U.S.C. § 2000 (d) and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state tax commission may require.

(C) "Regular school year" as used in this subsection shall mean the months of the taxable year exclusive of July and August.

(4) *Additional information.* Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.

§ 6 *Legislative findings.* The legislative hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils,

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the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps , fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

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a. Definitions. As used herein:

1. *enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.*

2. *borough shall mean any borough of the city school district of the city of New York.*

3. *aid ratio shall mean the higher of the actual aid ratio established for such district or borough, or thirty-six per centum.*

b. Computation. The amount to be apportioned shall be the product of:

1. *the number of enrolled students in any school district or borough multiplied by one hundred dollars; and*

2. *the aid ration of such school district or borough.*

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ration for each borough.

d. Any apportionment as herein computed shall be subjected to regulations promulgated by the commissioner and shall not be deducted in determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year next succeeding such year.

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§ 8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively, as follows:

1. No schoolhouse shall be erected, *purchased*, repaired, enlarged or remodeled in any school district except in a city school district in a city seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specification shall show in detail the ventilation, heating and lighting of such buildings.

In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may proscribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousand dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set

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forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection *or purchase* of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exits upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection *or purchase* of any school building or addition thereto or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of

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education shall not approve the plans for the erection or purchase of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment accessibility; soil conditions; initial and ultimate costs.

§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. *The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for a appraisal of such buildings as school buildings and the land on which they are situated as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.*

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two

Chapter 414, Laws 1972

hundred thirty-four of the laws of nineteen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, *purchase of existing structures*, for site purchase and improvement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs incidental to such construction or reconstruction, or *purchase of existing structures*.

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a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction *and the purchase of existing structures* the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven through nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the cost of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction *and the purchase of existing structures*

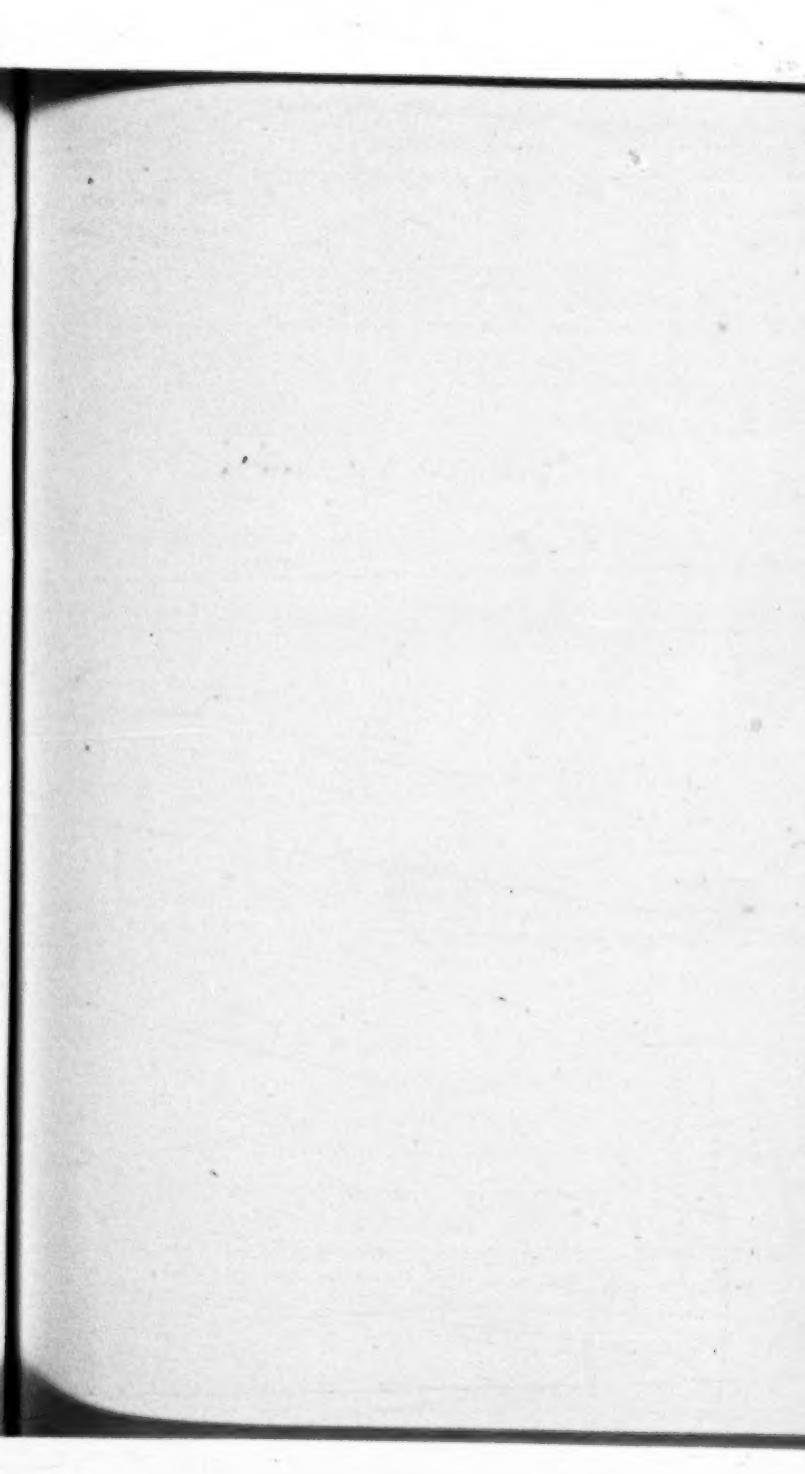
Chapter 414, Laws 1972

may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two, and the provisions of paragraph (14) of subsection (c) of section six hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

MR 23

Nos. 72-684, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY *et al.*,

Appellants,

v.

EWALD B. NYQUIST, *etc.*, *et al.*,

Appellees,

SENATOR WARREN M. ANDERSON, *etc.*,

Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*,

Appellees,

EWALD B. NYQUIST, *etc.*, *et al.*,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*,

Appellees,

FRISCILLA L. CHERRY, *et al.*,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Filed November 21, 1972

Probable Jurisdiction Noted January 22, 1973

**BRIEF ON BEHALF OF APPELLEE
WARREN M. ANDERSON**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY *et al.*,

Appellants,

v.

EWALD B. NYQUIST, *etc.*, *et al.*,

Appellees,

SENATOR WARREN M. ANDERSON, *etc.*,

Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*,

Appellees,

EWALD B. NYQUIST, *etc.*, *et al.*,

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COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Filed November 21, 1972
Probable Jurisdiction Noted January 22, 1973

**BRIEF ON BEHALF OF APPELLEE
WARREN M. ANDERSON**

Preliminary Statement

Appellee, Senator Warren M. Anderson, is successor to Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate. Senator Brydges retired from the Senate on December 31, 1972. Appellee Anderson submits this brief on his appeal from the judgment of the United States District Court for the Southern District of New York, entered on October 20, 1972, which declared that Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State violate the Establishment Clause of the First Amendment to the Constitution of the United States and which permanently enjoins welfare payments under said sections: (1) to protect the health, safety and welfare of children attending nonpublic elementary and secondary schools located in poverty areas; and (2) to partially reimburse low-income parents for tuition paid by them to enroll their children in nonpublic elementary and secondary schools. Appellee, Senator Warren M. Anderson also moves herein to affirm so much of the judgment of the Court below as declared constitutional Sections 3, 4 and 5 of Chapter 414 which provide a modification of gross taxable income for middle-income parents for tuition paid to enroll their children in such nonpublic schools.

By agreement among counsel, the appellants in 72-694 will be deemed the appellants in this consolidated appeal.

Opinion Below

The opinion of the District Court for the Southern District of New York enjoining the welfare payments for poverty area schools and low-income parents under Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State and sustaining the constitutionality of the modification of gross taxable income, provided for under Sections 3, 4 and 5 of such chapter, and the dissenting opinion thereto, are reported in 350 F. Supp. 655 (S.D.N.Y. 1972).

Jurisdiction

The judgment of the District Court for the Southern District of New York was entered on October 20, 1972. On November 17, 1972 Senator Earl W. Brydges, predecessor in title to Appellee Warren M. Anderson, filed his Jurisdictional Statement in this Court. On January 22, 1973 this Court noted probable jurisdiction. The jurisdiction of this Court rests on 28 United States Code, Section 1253. The following most recent decisions sustain the jurisdiction of this Court to review judgment on direct appeal in this case: *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U. S. 602 (1971), and *Tilton v. Richardson*, 403 U. S. 672 (1971).

Questions Presented

Is the "Establishment Clause" of the First Amendment of the U. S. Constitution violated by those provisions of a 1972 New York State Legislative Program, which specifically provide a modification from gross taxable income for middle-income parents who pay tuition for their children enrolled in nonpublic schools; and which specifically assist poor parents in educating their children: (a) by partially paying State monies for insuring that the nonpublic school buildings in low income Title IV areas housing poor elementary and secondary school children comply with certain minimum State required health and safety maintenance standards; and (b) by partially reimbursing poor parents for secular tuition payments to continue their children in nonpublic schools, especially when there are insufficient public funds and buildings to educate these nonpublic school children in the public schools?

Statutes Involved

The statute involved is Chapter 414 of the 1972 Laws of New York State, entitled "An Act to amend the education law, in relation to health, welfare and safety grants for pupils in

nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low-income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings." (Appendix to this Brief)

Statement

Appellee, Senator Warren M. Anderson, is the Majority Leader and President Pro Tem of the New York State Senate. Appellee's predecessor Senator Earl W. Brydges, retired from the Senate on December 31, 1972 and thereafter Appellee Warren M. Anderson on January 3, 1973, was substituted as proper party defendant in this action as the present Majority Leader and President Pro Tem of the New York State Senate.

On May 25, 1972, Appellants, allegedly taxpayers of New York State, instituted this suit in the United States District Court for the Southern District of New York, praying, *inter alia*, that appellees, Ewald B. Nyquist, Commissioner of Education, Arthur Levitt, Comptroller, and Norman Gallman, Commissioner of Taxation and Finance of the State of New York, be permanently enjoined from (1) approving or paying any funds pursuant to Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State, which provide for health, safety and welfare grants and partial tuition reimbursement payments to low-income parents for educating their children in nonpublic schools; and from (2) according a modification of taxable gross income, pursuant to Sections 3, 4 and 5 of Chapter 414, to middle-income parents as financial relief for educating their children in nonpublic schools.

Parents of children enrolled in nonpublic schools, namely, appellees Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr. and Adamina Ruiz, were permitted to intervene as

parties defendant. Similar permission was granted to appellee, Senator Earl W. Brydges, then Majority Leader and President Pro Tem of the New York State Senate.

On June 20, 1972, a three-judge District Court consisting of Hon. Paul R. Hays, U. S. Circuit Judge; Hon. John M. Cannella and Hon. Murray I. Gurfein, U. S. District Judges, was duly constituted, pursuant to 28 U.S.C. §2281 and §2284, on consent of all parties. A hearing on the merits was held on July 6, 1972.

On October 2, 1972, Judge Gurfein handed down an opinion, concurred in by Judges Cannella and Hays, declaring, *inter alia*, that Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State pertaining to health, safety and welfare grants and tuition reimbursement payments violate the Establishment Clause of the First Amendment. As part of the Court's opinion, Judge Gurfein, with Judge Cannella concurring, held that Sections 3, 4 and 5, with respect to modification of taxable gross income, did not violate the Establishment Clause.

The Court, in striking down Section 1, which provides health, safety and welfare grants for nonpublic schools in economically impoverished areas, concluded, in part, as follows:

"In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both."

In striking down Section 2 of Chapter 414, which provides for partial reimbursement to poor parents for the tuition they pay to send their children to nonpublic schools, the Court recognized the secular purposes of this program and observed as follows:

"The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise

of religion is inhibited if the needy may not be subsidized with State funds to aid their 'right' to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

"These are serious arguments that cannot be disregarded particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

"The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society."

On October 20, 1972, judgment was entered permanently enjoining the

"payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair"

and

"payment for or reimbursement of any tuition payments heretofore or hereafter made to nonpublic elementary and secondary schools."

In upholding the constitutionality of the modification from gross taxable income for tuition paid by middle-income parents to nonpublic schools, the majority opinion reasoned, in part, as follows:

"The third part [Sections 3, 4 and 5] of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools in the State. Second, it does not involve a subsidy or grant of money from the State Treasury as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. See *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as to not involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the ongoing political activity as likely, in our opinion, to cause division on strictly religious lines."

Summary of Argument

It is in the interest of the State of New York to insure that all children regardless of race, color, religion, national origin, income level or poverty background are educated to their fullest potential. To maintain this level of scholastic achievement, it is important that nonpublic schools continue in existence. The demise of the nonpublic schools of this State presents so formidable a catastrophe as to threaten the quality of education of all the children of New York State. As a result of this awareness, the New York State Legislature enacted in 1972 compre-

hensive programs designed to assist low-income and middle-income parents to exercise their constitutional right to educate their children in nonpublic schools. These multi-faceted aid programs provide for: (1) the health, safety and welfare of children attending 280 nonpublic schools located in impoverished areas; (2) tuition reimbursement grants for low-income parents; and (3) a modification of taxable gross income for middle-income parents educating their children in the nonpublic schools. The educational grants to nonpublic schools in impoverished areas to insure the health, welfare and safety of children attending those facilities and the tuition reimbursement payments to low-income parents are public welfare benefits. Artificial barriers should not be erected to stifle the will of state legislatures to offer minimal assistance to parents and their children who choose a parochial school over the public school. The program of health, safety and welfare grants is authorized within the guidelines of this Court's decision in the *Lemon Case* which acknowledges that states do have a legitimate interest under their police powers to insure the health, safety and welfare of children in nonpublic schools. The tuition reimbursement grants for low-income parents, limited in amount and in payment to the individual parent rather than the nonpublic school institution, are clearly reimbursement payments for secular and neutral services, recognized as constitutional by this Court in the *Lemon case*. The program affording a modification of taxable gross income for middle-income parents is a response to the well-settled constitutional principle that taxing authorities, such as the State, have very wide latitudes in making exceptions from taxes. Moreover, this form of tax relief for middle-income parents does not violate the Equal Protection Clause inasmuch as this class of beneficiaries bears a fair and substantial relationship to the object of the legislation; namely, a tax incentive to parents who expend their own funds for the education of their children and thereby save the State substantial expenditures for otherwise educating their children in public schools. These three State educational programs are further in accord with the guidelines of this Court in the *Lemon Case* in

that no "excessive entanglement" is involved in their implementation. The administrative procedures employed are purely technical in nature and involve no scrutiny of the religious institutions or their activities. The "Establishment Clause" with all of the judicial gloss placed on it should not be distorted to stifle the will of the democratic organs of our society to offer minimal assistance to enable parents to choose the nonpublic schools over the public schools.

ARGUMENT

Point I

The three-judge federal district court erroneously held that the state's public welfare programs consisting of low-income educational assistance programs of health, safety and welfare grants and tuition reimbursement grants would unconstitutionally "advance" religion and would involve "excessive entanglement" between government and religion.

The low-income educational assistance programs enacted by Chapter 414 of the 1972 Laws of New York State are specifically designed, in Sections 1 and 2, to partially assist low-income parents in the education of their children in nonpublic schools. These programs are a response to the fiscal crisis facing the entire educational system in New York State and also the economic crisis facing poverty area parents, who, without some form of public welfare assistance, would be unable to provide for the education of their children.

A. The Provisions of Section 1—The Health, Safety and Welfare Grants

To insure the health, safety and welfare of nonpublic school children, Section 1 of Chapter 414, provides grants for maintenance and repair programs for nonpublic schools in urban areas which serve high concentrations of students from low-income families. These poverty area schools are designated on

the basis of the number of enrolled children from families receiving social service assistance in the form of aid to dependent children. Designation of eligible schools is by the New York Commissioner of Education and the local school superintendent pursuant to Title IV of the Federal Higher Education Act.

The basic grant is \$30 per pupil, which is increased by \$10 for children receiving instruction in school buildings over 25 years old. The grants, sent directly to the schools, are to be applied only for such health, safety and welfare purposes as heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the State Commissioner of Education may deem necessary to ensure the health, welfare and safety of enrolled students. The schools must annually account for the proper expenditure of such grants, by a private audit. In no event can the total payment to a nonpublic school for such services exceed one-half of the actual costs¹ of such comparable services in the public schools. Approximately 280 nonpublic schools, with an enrollment of 100,000 students, are eligible. (There are approximately 2,000 nonpublic schools in the State.)

B. The Provisions of Section 2—Tuition Reimbursement Grants for Low-Income Parents

Section 2 of Chapter 414 provides partial assistance to low-income families in meeting their financial burden in supporting the compulsory education of their children who are full time students in New York nonpublic elementary and secondary schools. This Court has long recognized the right of individual parents to select a school, other than public, for the education of their children (See, *Pierce v. Society of Sisters*, 268 U. S. 510 (1925)). This right, however, is diminished or even denied to

¹ These costs are presently available to the State Education Department from annual reports of the public schools.

children of low-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

The partial assistance to low-income families consists of tuition reimbursement payments to parents paying tuition for children in nonpublic schools. Eligible parents are those with net taxable incomes of under \$5,000 a year. The payments, made directly to the parents, would amount to \$5 per month for each child in grade levels one through eight and \$10 for children in grade levels nine through twelve. Payments would be reduced for months in which a child is not enrolled in the nonpublic school. The tuition reimbursement cannot exceed 50% of the actual tuition payments made by the parent. Eligible parents must apply for such assistance to the State Commissioner of Education following completion of the school year for which tuition has been paid.

A similar measure was recommended on April 20, 1972 for enactment on a Federal level by President Nixon's Panel on Nonpublic Education. (See, Final Report of the President's Panel on Nonpublic Education, U. S. Gov. Print. Office, Stock No. 1780—1972), pg. 35. The Panel is a sub-committee of the "blue ribbon" group of educators, lawyers and fiscal experts who constitute the President's Commission on School Finance.

C. Legislative History of Chapter 414—Fiscal Crisis in New York State

New York State legislators, representing all political viewpoints, are concerned not only about the 3.2 million pupils enrolled in our public schools but also about the 750,000 pupils enrolled in the State accredited nonpublic schools, where children are required by law to receive a secular education equivalent to that in the public schools.² Since 1787 the public policy of the State has been that all children, regardless of how or

² N. Y. Education Law, Section 3204.

where they are educated, are to receive a standard quality education and this is to be insured by the State.⁸

Article XI, Section 1 of the New York State Constitution charges the Legislature with the responsibility for "... the maintenance and support of a system of free common schools, wherein all the children of this State may be educated." For the past several years the State Legislature has been confronted with a crisis in financing the education of all its children. During this period approximately 4 million pupils have been in attendance yearly in the public and nonpublic schools of the State.

The cost to the State of financing public education has risen to about \$2.5 billion in 1972-73, an increase of almost \$500,000,000 since 1969-70, while local school district contributions increased by a commensurate amount.

Approximately 750,000 children, 18% of all students, are currently attending State chartered and regulated nonpublic schools at practically no cost to the taxpayer. Greatly increased costs for parents at these nonpublic schools, coupled with the ruinous inflation of recent years and ever rising taxes to support government operations at all levels including education, threaten a precipitous collapse of the nonpublic school system with catastrophic consequences on the public sector.

Particularly affected are city school districts often characterized by overcrowded and outdated school buildings, unsatisfactory pupil-teacher ratios and hampered by constitutional tax limits in raising funds for education. Indeed, most of these school districts have little tax margin remaining. The Table below demonstrates the relationship between remaining property tax leeway, the number of nonpublic school children and the local amount from their major source of revenue that

⁸ N. Y. Laws Ch. 82 (1787) established the Regents of the University of the State of New York "... to visit and inspect all the colleges, academies and schools which are or may be established in this State, examine into the status and system of education and discipline therein, and make a yearly report thereof."

would be available to support an influx of nonpublic students into the public schools.

PROPERTY TAX REVENUE REMAINING
UNDER CONSTITUTIONAL LIMITS FOR THE SUPPORT
OF EDUCATION IN SELECTED CITIES⁴

City	1971-1972 Property Tax Margin Remaining	1970-1971 Nonpublic Enrollment	Amount avail- able per pupil at local level if all nonpublic pupils were transferred to public schools
Auburn	\$ 254,122	1,709	\$148.69
Binghamton	175,826	2,505	70.19
Buffalo	5,528,877	32,353	170.89
Jamestown	36,826	535	68.83
New York	1,400,187	399,615	3.50
Niagara Falls	1,118	3,430	.32
Rochester	2,835,858	14,986	189.23
Syracuse	3,798	9,640	.39
Troy	896,628	3,325	269.66
Utica	664,116	5,402	122.93
Yonkers	—0—	9,946	—0—

The above city school districts have within their geographic boundaries more than 60% of all nonpublic school pupils in New York State. It is readily demonstrated from the above Table that the ability of those school districts to finance even the local share of education costs (average of \$750 per pupil) would be well nigh impossible if these students should transfer in any substantial numbers. In fact, the Table demonstrates

⁴ Table and informational data in this paragraph "C" are derived from 1972 Report of New York State Commission on the Quality Cost and Financing of Elementary and Secondary Education. Chapter V—Aid to Nonpublic Schools.

that even a small number of transfers in certain cities—New York City, Niagara Falls, Syracuse and Yonkers—could constitute financial disaster for those areas.

The average operating costs for each public school child in New York State is approximately \$1400 per year. The financial crisis that would be precipitated by attempting to maintain this present per pupil expenditure, should there be a collapse of nonpublic education, would be of shocking proportions. Consider, for example, the over \$1 billion additional annual operating cost that would be necessary, (750,000 pupils \times \$1,400) and the estimated \$1.4 billion added expenditure necessary to finance capital structures capable of handling this influx of children. The enormity of such a fiscal nightmare can only be placed in perspective when one considers that this is \$600,000,000 more than the entire revenue currently generated by the New York State sales tax and would necessitate almost doubling the State income tax. Can a State which has balanced its 1972-73 budget on *anticipated* Federal revenue sharing of \$400,000,000 and whose tax burden is among the highest in the country be expected to meet this added fiscal burden? Should local school districts relying on a regressive property tax, already at the confiscatory level, be asked to assume that burden? The answer to the Legislature was obvious. Survival of quality education was at stake.

Most severely threatened by New York State's fiscal crisis are the inner city poverty area schools. This is the case because the parents of the children attending the nonpublic schools in these areas are either impoverished or of such low-income standing that they are unable to contribute sufficiently to the maintenance and operation of the nonpublic schools. Of particular significance is the additional fact that in these inner city areas the public schools are already undersized and overcrowded and incapable of accepting any further influx of students (cf., *Nebraska Bd. of Educ., et al. v. School District of Hartington, et al.*, 188 Neb. 1 (1971), cert. den. Supreme Court Docket No. 71-1537 (October 16, 1972), which sustained the constitutionality of a state financed program of secular education in economically hard pressed inner city schools).

Thus the New York State Legislature responded, by overwhelming pluralities in both houses, with programs of aid to assist low-income parents in educating their children in non-public schools. Chapter 414 of the 1972 Laws of New York, provides broad-based programs to insure the quality of education of all children within the State during this period of extreme fiscal crisis. It encompasses a multi-faceted aid program designed to insure the health, safety and welfare of children attending schools in impoverished areas; and a program of financial grants to parents of low-income status, to enable all parents, not just the wealthy, to continue to educate their children in nonpublic schools and to avoid any precipitous school closings which would necessarily endanger the quality of education in the public schools.

D. Constitutionality of Health, Safety and Welfare Grants

1. Purpose and primary effect tests are satisfied.

Section 1 of Chapter 414 satisfies the constitutional standards succinctly stated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . ."⁵

The background history to Chapter 414 of the 1972 Laws of New York State and the legislative findings contained in the legislation (Appendix to this Brief) demonstrate graphically the grave emergency now existing concerning the education of children from low-income families concentrated in inner-city areas. At the heart of this crisis is the lack of financial ability of low-income parents to provide for the proper maintenance and repair of school buildings to insure the health, safety and welfare of the students. As demonstrated above (pgs. 12 through 14) closing such schools and absorbing the nonpublic school population into the public schools is not a viable alternative because of the already overly crowded conditions in

⁵ The Third Constitutional test that "... the statute must not foster an excessive government entanglement with religion" 403 U.S. 602, 613, is likewise satisfied. See this Brief pgs. 22 through 24.

the public schools and the lack of public funds either at a local level or a state level to build the necessary structures for educating children in the inner-city areas.

In the *Lemon case* this Court acknowledged that States do have a legitimate interest under their police powers to insure the health, safety and welfare of children in nonpublic schools.

In recognition of this permissible area of legislation, the New York State Legislature provided for grants in aid to nonpublic schools located within impoverished areas. Notably, the children benefiting from such grants attend only schools where teachers, including those in nonpublic schools, are entitled to partial forgiveness of repayment of Federal educational loans. Such loan relief is afforded under Title IV of the Federal Higher Education Act of 1965 to induce teachers to instruct in impoverished areas.

To insure that the primary effect of the grants is not to advance religion, an annual accounting is required to establish that the State payments are applied solely for the health, safety and welfare of children attending such schools. As additional assurance of the secularity of the program, in no event can the total payment to a nonpublic school for such services exceed one-half the actual costs of such comparable services in the public schools.

2. No Violation of New York Blaine Amendment.

The so-called "Blaine Amendment," Article XI, Section 3, of the New York State Constitution is cited by appellants as authority for prohibiting the expenditure of State funds for the health, safety and welfare grants to poverty area schools. *Blaine* prohibits the expenditure of public funds . . . "directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any demominational tenet or doctrine is taught. . . ."

Notwithstanding these explicit prohibitions, *Blaine* has no application to state welfare programs, of which Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York are a part.

Article VII, Section 8 of the New York State Constitution provides:

"2. Subject to the limitations on indebtedness and taxation, *nothing in this constitution contained* shall prevent the legislature from providing for the aid, care and support of the needy . . . or for health and welfare services for all children. . . ." (emphasis added)

The educational appropriations consisting of health, safety and welfare grants which benefit poverty area students and the tuition reimbursement payments to low-income parents, which partially relieve their financial burdens of educating their children, are public welfare benefits which are not limited by the Blaine Amendment. As noted in The Final Report of the President's Panel on Nonpublic Education, *supra*, pg. 28:

"Finally, it might be noted that some constitutional lawyers feel the time has come to challenge the denial of benefits to nonpublic school students on grounds that educational appropriations are public welfare benefits which should not be restricted by religious conditions. The challenge should be mounted."

E. Constitutionality of Tuition Reimbursement Grants for Low-Income Families

1. Purpose and Primary Effect Tests are Satisfied.

The three-judge District Court recognized that the low-income tuition reimbursement program embraces secular purposes, namely:

"The essential reliance of the State in support of this part of the statute is two-fold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their 'right' to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast

upon the State in the event of their unfortunate demise will be almost intolerable.

"These are serious arguments that cannot be disregarded, particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public."

Nonetheless, in spite of the lower court's acknowledgement of the fiscal crisis facing both low-income parents and the state, the court held the low-income tuition reimbursement plan unconstitutional because in its view, it violated the second criterion of the *Lemon* decision, i.e., the prohibition against "advancement of religion." It is submitted that this conclusion was based on a totally constricted and myopic view of the *Lemon* decision and its underlying First Amendment rationale.

In *Lemon* itself, the Supreme Court cautioned that in this unique and sensitive constitutional area substance must prevail over form and courts are not "to engage in a legalistic minuet in which precise rules and forms must govern," 403 U.S. at 614; and, in the companion case, *Tilton v. Richardson*, 403 U.S. 672 at 678 the Court even more sternly admonished that:

"Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics . . . Candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication."

We submit that in holding the low-income tuition reimbursement plan void, the three-judge District Court did precisely what this Court in *Lemon* and *Tilton* admonished against; the lower court expressly viewed the *Lemon* test as a simplistic if not arbitrary prohibition of direct state grants of money to aid church-affiliated schools. By so viewing the *Lemon*

criteria the lower court, we submit, was in reality converting it from a principle of living and organic law into a rigid mechanical formula or rule of the physical sciences, such as Newton's Law of Gravity or the Pythagorean theorem.

But the "advancement" standard of *Lemon* is not, as the lower court believed, whether a program of fiscal aid to non-public education will in any way "advance" religion. Quite the contrary, the standard as clearly enunciated in this Court's opinion in *Lemon* (and repeated in *Tilton*) is that the program must have "a primary effect that neither advances nor inhibits religion." (403 U.S. at 612). We submit that the primary effect of the low-income tuition reimbursement plan is clearly and overwhelmingly secular; it is a welfare program to alleviate the present overcrowding and fiscal crisis in inner-city public and nonpublic schools and enable numerous children from low-income families to obtain a basic education in the only schools that are now available to provide it.

Contrary to the position taken by the appellants, there is absolutely no evidence in the record which demonstrates that the nonpublic schools that might receive some indirect benefit under the low-income tuition reimbursement plan are primarily or even secondarily religious in their purpose and mission.⁶ Rather, the background of the legislation and the specific legislative findings incorporated in the act demonstrate most conclusively that the purpose and mission of those schools is to educate one out of five of all school children in the entire State, relieve an enormous economic burden from the taxpayers, and provide children with a secular education.

This Court has long recognized the right of individual parents to select a school other than public for the education of their children (See, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). This right, however, is diminished or even denied to children of lower income families, whose parents, of all groups,

⁶ In fact, Appellee has specifically denied in his answer such allegations in appellants' complaint (Appendix, pg. 73a.)

have the least options in determining where their children are to be educated. In keeping with this viewpoint, this Court in *Everson v. Board of Education*, 330 U.S. 1 (1947), sustained a state-financed program of bus transportation enabling children to attend church-related schools. In its opinion this Court emphasized the public purpose which was being performed, saying:

"It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." (330 U.S. 1, 7)

Twenty years later in *Board of Education v. Allen*, 392 U.S. 236 (1968), this Court sustained a state-financed program of loan of secular textbooks which included children attending church-related schools. In the majority opinion, Justice White suggested some of the guidelines for judging constitutional permissibility of other programs, saying:

"Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." (392 U.S. 236, 243)

The third decision to deal with the issue of education aid was *Lemon v. Kurtzman*, et al., 403 U.S. 602 (1971) with its related cases of *Earley v. DiCenso*, and *Robinson v. DiCenso*, as well as *Tilton v. Richardson*, 403 U.S. 672 (1971). Unlike the two prior decisions upholding aid, the *Lemon* decision, held that programs to subsidize teachers' salaries in church-related schools were unconstitutional. However, the basis for unconstitutionality was not violation of the "purpose" or "primary effect" tests, but the "excessive entanglement" test.

Lemon did not deal with other programs, yet unfashioned, which take the form of educational public welfare tuition grants, as herein presented.

Even Justice Douglas, who presented a strong dissent in the *Allen* case, seemed to concede the validity of child and parent benefit legislation when he stated:

"There is nothing ideological about a school lunch,

or a public nurse, or a *scholarship*." (392 U.S. 236, at 257. (emphasis added)).

F. States Have Broad Discretion in the Enactment of Public Welfare Legislation

The New York Health, Safety and Welfare Grants and Tuition Reimbursement violate no constitutional principle. The State has designed a program which it feels best preserves and perhaps even enhances the educational opportunities of all children of the State. While the Courts may not agree with the wisdom of this legislation, it has been recognized that the states are free to disburse welfare funds without judicial intervention so long as the action is rationally based and free from "invidious" discrimination. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). The New York program has the prophylactic effect of insuring the quality of education of all the children of the state and it is unquestionably rationally based and does not invidiously discriminate. In *Dandridge*, this Court said, "... [T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." 397 U.S. at 486. The Court further stated at 486, 487, "... [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61."

Finally, this Court states in *Dandridge*, at page 487, "... [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." Cf. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 584-585; *Helvering v. Davis*, 301 U.S. 619, 644. Not only are New York's welfare funds limited, its entire budget is precariously balanced only by federal revenue sharing. The low-income educational assistance programs were the legislative response to the State's fiscal crisis and any cutting of this aid by the judiciary will directly harm all the children of New York State.

G. Neither the Health, Safety and Welfare Grant Program Nor The Tuition Reimbursement Program Involves Excessive Entanglement Between Government and Religion

Entanglement between government and religion reaches an impermissible degree when state aid programs to nonpublic schools involve "pervasive restrictions" that require "a comprehensive, discriminating, and continuing state surveillance . . . [of the nonpublic schools] . . . to ensure that these restrictions are obeyed and the First Amendment otherwise respected." *Lemon v. Kurtzman*, 403 U.S. 602 at 619. In *Lemon*, the Court found that Rhode Island and Pennsylvania nonpublic school assistance programs ran afoul of the entanglement standard and were thus unconstitutional. A comparison of the nonpublic school assistance programs in *Lemon* and the New York statutes now before the Court clearly shows that the instant statutes do not impermissibly entangle the State in nonpublic schools.

The Rhode Island statute in *Lemon* authorized state supplements to the salaries of teachers of secular subjects in nonpublic schools; the state paid such teachers an amount not in excess of 15% of their annual salary. To qualify for the supplement a teacher was required to teach at a nonpublic school at which the average per pupil expenditure on secular education was less than the average in the public schools. Eligible schools were required to submit supporting financial data to the state to assure compliance with the per pupil expenditure limitations. The government was required to examine the school's records to determine how much was expended for religious education. Eligible teachers were precluded from teaching courses in religion, were permitted to teach only those courses taught in public schools, and could use only teaching material used in the public schools.

The Pennsylvania statute in *Lemon* authorized the state to "purchase" certain "secular educational services" directly from nonpublic schools. The nonpublic schools were required to maintain elaborate accounting records to separately identify the cost of the "secular educational services" and the records

were to be audited by the state to assure compliance. Reimbursement was restricted to courses taught in the public schools and payment for any course containing "any subject matter expressing religious teaching or the morals or forms of worship of any sect," were forbidden.

This Court found that in separating "the religious from the purely secular aspects of [nonpublic school] education . . . to ensure that no [First Amendment] trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions." These restrictions required "comprehensive, discriminating, and continuing state surveillance . . . that resulted in prophylactic contacts . . . involving excessive and enduring entanglement between state and church." (403 U.S. at 617, 619). The Court held that the state inspection and evaluation of the religious content of the nonpublic schools was particularly offensive to the First Amendment and "fraught with the sort of entanglement that the Constitution forbids." (403 U.S. 617 at 620).

In marked contrast, the New York statute here is singularly free of entangling provisions. There is no provision or necessity for any state surveillance, policing or auditing of nonpublic schools. Specifically, the New York statute does not involve excessive entanglement because:

(a) State inspection or auditing of the books and records of nonpublic schools is neither required nor necessary inasmuch as the audit in health, safety and welfare grant programs is exclusively the responsibility of the school.

(b) State inspection or evaluation of the religious content, curricula, or classroom activity of nonpublic schools is not required.

(c) Nonpublic school teachers are not required to be examined, policed, or to sign agreements concerning their religious teaching or beliefs and such requirements are not necessary.

(d) The limitations imposed on the health, safety

and welfare grants, namely 50% of the average state-wide costs in the public schools and a comparable ceiling of 50% of the total tuition paid by the parent are statistical guarantees of neutrality. These limitations assure the intrinsic secular nature of the public aid so that inspection and surveillance by the state is wholly unnecessary. In other words, these *secularly self-defining* and *self-executing* grant limitations are built-in safeguards and assurances against impermissible entanglement between Church and State.

H. Constitutionality of Tuition Reimbursement Grants—Ohio and Pennsylvania Plans Distinguished.

Recent decisions have invalidated two state plans for providing tuition reimbursements to parents whose children attend nonpublic schools (*Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd*, 93 S. Ct 61 (1972)); *Lemon v. Sloan*, 340 F. Supp. 1356 (Ed. Pa. 1972), (probable jurisdiction noted, 35 L. E.D. 2nd 268 (1973)). An analysis of those states' statutes demonstrates that these invalidated plans are distinguishable in many significant aspects from the poverty area/ low-income assistance plans of New York.

1. Ohio Plan distinguished (*Wolman v. Essex*, *supra*).

The major points of distinction between the Ohio tuition reimbursement plan and the New York plan are as follows:

a) Method of Payment encourages excessive entanglement

The Ohio plan provides for state aid payments to local school districts which in turn make tuition reimbursement payments to eligible parents. Such procedure engenders excessive religious entanglement with public officials at local community levels. The New York statute provides for direct payment by the State Commissioner of Education to the applying parent.

b) Uncertain amount of payment

The Ohio tuition reimbursement payments were fixed at \$90 for the first year and then left to the determination of the

Commissioner of Education in future years. On its face, such procedure invites ongoing political entanglement. The New York tuition reimbursement payments are fixed by statute.

c) Tuition, Reimbursement Payments Not Limited to Secular Purposes

Under the Ohio plan, a parent could be reimbursed 100% of the tuition paid for his child. In such instances, a portion of the State payment would represent aid for religious instruction. The New York statute provides for a maximum 50% reimbursement, or in other words a statistical guarantee of neutrality. In New York 30% of the total costs of education in nonpublic schools is paid by tuition, the remainder is derived through voluntary contribution, endowments and the like. The maximum tuition reimbursement by the State is thus only 15% of educational costs in the nonpublic schools. Therefore, in no instance could it be persuasively argued that New York's tuition reimbursement payment supports any religious teaching whatsoever, since the compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses.

d) Tuition reimbursement payments not limited to low-income families

In not restricting the tuition reimbursement payments to low-income families, the Ohio plan was not an educational welfare benefit plan, and was not responsive to the particular financial plight of the low-income parent. The New York plan is solely geared for and restricted to low-income families.

e) Tuition reimbursement payments not responsive to costs of tuition

The nonpublic schools in Ohio instituted a tuition program just prior to enactment of the Ohio plan, thus raising the specter that the plan was a subterfuge to channel monies directly to nonpublic schools. The New York plan, on the other hand, is responsive to a long-established tuition program for

the support of nonpublic schools. Its only purpose is to allow low-income parents to participate in such nonpublic schools.

2. Pennsylvania Plan Distinguished (*Lemon v. Sloan, supra*).

The Pennsylvania tuition reimbursement plan bears many of the same infirmities as the Ohio plan. The Pennsylvania statute fails to restrict the amount of tuition reimbursement to less than 100% of tuition paid and also does not restrict the payments to low-income families.

POINT II

New York State and the Federal Government have a long-established policy of monetary grants which subsidize nonpublic school education and services furnished by church-related facilities.

As Justice Holmes noted nearly half a century ago: "A page of history is worth a volume of logic." (*New York Trust Co. v. Eisner*, 256 U.S. 349 (1921)). What Justices Holmes meant, of course, is that a practice deeply embedded in our Nation's history carries a certain presumption of constitutional validity.

New York State and the Federal Government have, over the past half century, created a clear pattern of monetary grants directly to individuals for expenses incurred in securing a nonpublic education and other services furnished by church-related facilities.

A. New York State's Historical Aid Programs to Nonpublic Institutions:

—Monetary aid for nonpublic school attendance

For over a half century the social welfare programs of our State have provided for payments for school expenses to enable parents of low-income to educate their children at nonpublic schools. This New York State policy authorizing monetary grants to assist children in attending nonpublic schools was enunciated

in Section 3209 of the Education Law (formerly Section 627 (f))⁷:

"Duties of public welfare officials with respect to indigent children. Public welfare officials, except as otherwise provided by law, shall furnish indigent children with suitable clothing, shoes, books, food and other necessities to enable them to attend upon instruction as hereinbefore required by law." (Derived from Chapter 645 of the Laws of 1928).

—Education aid to religious-oriented institutions

For over a century New York State has made direct grants to private religiously-oriented schools for the education of children attending such institutions. Provision for such grants is contained in the following Articles of the New York Education Law:

Article 81—*Orphan Schools* (Derived from Chapter 261 of the 1850 Laws of New York). In a Taxpayer's action to restrain the payment of public moneys to such schools, the fact that the asylum was controlled by a Re-

⁷ In commenting on the breadth of this enactment, the Attorney General of the State of New York noted (1935 Op. Atty. Gen., 381):

"By this amendment the Legislature has made it the affirmative duty of 'public welfare officials' to furnish 'indigent children' with the necessities of life, including books, shoes, clothing, etc. 'to enable them to attend upon instruction as hereinbefore required by law.' Compulsory education is the rule in this State. Such education may properly be afforded by parochial as well as by public institutions. *Pierce et al. v. Society of Sisters*, 268 U.S. 510 (Oregon School case). No distinction or discrimination is seen in the legislative language of Section 627. The only basis is *need*. There are observed no exceptions which provide otherwise in our statutes.

"You are, therefore, advised that the public welfare officials (and this should include those 'public welfare officials' administering relief under the Wicks Act) should and must provide children who are indigent with the necessities specified to enable them to attend school, whether it be public or parochial in character. It may also be noted that the parochial schools are in substance *public* in character also. The foregoing applies with equal force to those children attending parochial schools of other denominational character, be they Jewish, Protestant or of other persuasion."

ligious organization and that the teachers wore the garb of the sisterhood, was immaterial. The Court concluded that it was not practical to instruct the children elsewhere. *Sargent v. Board of Education*, 177 N.Y. 317 (1904).

Article 83—*Indian Schools* (Derived from Chapter 71 of the 1856 Laws of New York).

Article 85—*Instruction of the Deaf and of the Blind* (Derived from Chapter 413 of the 1877 Laws of New York).⁸

Also authorized are payments of State monies to religious agencies for boarding *wayward children* in order to insure their care and protection (Article VI of the Social Services Law of the State of New York, which was derived from Chapter 264 of the 1898 Laws of New York).

Bus transportation aid:

For over 30 years bus transportation has been provided in New York for children attending parochial schools. (N. Y. Education Law, Section 3620).

Textbook aid:

Textbook aid has been provided in New York for all students in grades 7-12 for over five years. (N. Y. Education Law, Section 701).

Scholar incentive aid:

Scholar incentive aid designed to diminish the burden of student tuition payments at the post-secondary level and equalize the ability to choose between public and private institutions was enacted in 1961 and is available to all students in public,

⁸ Noteworthy is the fact that this article specifically lists such institutions as St. Mary's School for the Deaf in the City of Buffalo, St. Joseph's School for the Deaf in the City of New York, St. Francis de Sales School for the Deaf and for the Hard of Hearing in the County of Kings.

private and sectarian institutions (N. Y. Education Law, Section 601-a).

Regents Scholarships:

Since 1913 Regents scholarships have provided tuition relief at the collegiate level for recipients regardless of the sectarian nature of the institution attended. (N. Y. Education Law, Section 601).

B. The Federal Government's Historical Aid Programs to Non-public Institutions

The Federal Government over the past quarter century has also established a firm pattern of financial aid for costs incurred in obtaining an education in church-related schools.

"G.I. Bill":

In 1944 Congress enacted the "G.I. Bill." The educational assistance benefits in this law for veterans and their families provides for specified monthly payments to meet, in part, the expenses of "subsistence, tuition, fees, supplies, books, equipment and other educational costs." (38 U.S.C.A., Section 1651, etc.)

Such Federal payments also extend to veterans who desire to complete high school or who need remedial assistance in order to begin college. (38 U.S.C.A., Section 1691-2).

Federal payments for such educational expenses also extend to the children of dead or disabled veterans (38 U.S.C.A., Section 1731, etc.)

Each of these Federal aid programs for educational assistance apply with equal force to attendance at church-related schools. Indeed, literally thousands of checks have been sent by "Uncle Sam" to students and their parents for attending church-related facilities. No Court has ever condemned Congress for attempting "to establish" a religion by making such payments or being "excessively entangled" in religion.

R.O.T.C. Benefits:

The Federal Government also makes direct educational assistance payments monthly to ROTC students (37 U.S.C.A.,

Section 209 and 10 U.S.C.A., Section 2107). The ROTC cadet at Notre Dame qualifies as does his counterpart at non-sectarian universities. No one has ever labelled this an "establishment of religion" nor "excessive entanglement" in religion.

Title I—Federal Elementary and Secondary Education Act:

The Elementary and Secondary Education Act of 1965 was a historic landmark in the extension of educational services and resources to all children in both public and private schools. The main element of this program is Title I which provides for the distribution of services based on educational need and disadvantage without regard to the school attended. Since the inception of this act, more than approximately one billion dollars worth of services has flowed to educationally deprived children in New York State.

It would serve no useful purpose to catalogue the other numerous instances of State and Federal grants which in one way or another assist parents or students in obtaining an accredited education. Suffice it to say that if the provisions of Chapter 414 of the Laws of 1972 of the State of New York are constitutionally defective, then so is a great mass of other State legislation and Federal enactments which are an integral part of the basic fabric of our State and Federal systems. It would be folly at this stage to charge that such a horrendous number of errors have been committed by our political institutions over the past century.

Those who would deny any form of public assistance to non-public education would, in effect, be negating the heritage of both our State and Federal governments.

We are not talking about "strangers" when we are talking about children in parochial and private schools. We are not talking about outlanders. We are talking about our own—about our own family of children within the State of New York. And in order to provide a vehicle through which this thought and this concept could be made effective, in the very beginning of this State we created the University of the State of New York to insure that every child satisfy minimum education require-

ments regardless of his attendance at a public or a nonpublic school.

Children attending nonpublic schools are *Our* people in legal concept, and we have the responsibility to see that education is provided for them and that they receive their education in healthy and safe surroundings and at public expense, if necessary.

POINT III

The lower court's decision should be sustained upholding the constitutionality of Sections 3, 4 and 5 of Chapter 414 which provide tax relief in the form of a modification in gross taxable income for middle income parents paying tuition for children in nonpublic schools.

"Purpose", "Primary Effect" and "Entanglement" Tests are Satisfied.

There is little to add to Part III of the incisive majority opinion of the Federal District Court below with respect to the constitutionality of a modification in gross taxable income for middle income parents paying tuition for children in nonpublic schools, which is provided for by Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State. The arguments raised by Appellants in their brief are basically a reiteration of those points contained in the dissenting opinion of Judge Paul R. Hays, which were specifically addressed and answered in the majority opinion. Appellee, therefore, relies in the main on Part III of the majority opinion of the Federal District Court for the Southern District of New York in support of his argument that this form of tax relief is constitutional. (J.S. 32a-39a)

POINT IV

The Health, Safety and Welfare Grant Program, the Tuition Reimbursement Grant Program and the Tax Relief Program, do not violate the Equal Protection Clause of the 14th Amendment.

A. Health, Safety and Welfare Grants and Tuition Reimbursement Grants

Those directly benefited by the health, safety and welfare grants authorized by Chapter 414 are the children attending the 280 nonpublic schools located in poverty stricken areas of New York State. Indirectly, financial relief is accorded to the children's parents who would otherwise be called upon to finance the maintenance of the health, safety and welfare facilities in these schools. As noted in the legislative findings, such parents are primarily of low-income status and thus unable to bear such financial burdens.

Likewise, tuition reimbursement grants to low-income families are intended to relieve the financial burden imposed on them for tuition payments for their children in nonpublic schools.

These state subsidies, which directly benefit low-income families, are in the nature of welfare grants. The preferential treatment these grants afford low-income families is a rational effort on the part of the New York State Legislature to tackle the educational problems of the poor.

In *Dandridge v. Williams*, 397 U. S. 471, 485-86 (1970), this Court "... decided that despite the fact that 'the administration of public welfare assistance ... involves the most basic economic needs of impoverished human beings,' claims of denial of equal protection in the allocation of welfare benefits did not invoke the 'strict scrutiny' developed by the Court for equal protection claims where 'fundamental rights' were at stake. The Court has since reaffirmed this principle in *Richardson v. Belcher*, 404 U. S. 78 (1971), and *Jefferson v. Hackney*, 406 U. S. 535 (1972). As said in the latter case, 406 U. S. at 546-47:

'So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional strait-jacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.'

"If the standard of review is as limited as held in *Dandridge*, appellants' equal protection claim does not reach the level of substantiality. However, it has been recently suggested, see Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 17-24 (1972), that the Court is developing a standard more stringent than that limited in *Dandridge* but lower than 'strict scrutiny'—whether as a replacement for the 'two-tiered equal protection' which many have found unsatisfactory, see *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 177 (1972) (dissenting opinion of Mr. Justice Rehnquist), or as a narrowing of the gap between the tiers. Even if the standard here applicable is 'that a statutory classification bear some rational relationship to a legitimate state purpose,' *Weber v. Aetna Casualty & Surety Co.*, supra, 406 U. S. at 172 (Mr. Justice Powell), or that 'an appropriate governmental interest [is] suitably furthered by the differential treatment,' *Chicago Police Department v. Mosley*, 408 U. S. 92, 95 (1972) (Mr. Justice Marshall), the test was met here." *Aguayo, et al v. Richardson, et al*, (2nd Cir., U.S. Ct. of Appeals), not reported, decided 1-18-73.

The New York Legislature's determination of whether and how improvements can be made in the welfare system is a "legitimate" and "appropriate" function of government. This determination is "suitably furthered" by controlled experiment, a method long used in medical science which has its application in the social sciences as well. As Mr. Justice Brandeis said in his famous dissent in *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932), "To stay experimentation in things social and economic is a grave responsibility."

Just as the Due Process clause should not have been read to condemn the experiment in the "laboratory" of "a single courageous State," the Equal Protection clause should not be held to prevent a state from conducting an experiment designed for the good of all, including the participants, on less than a state-wide basis. As said by Mr. Justice Holmes, dissenting in *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 41 (1928), "when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." See also *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61, 69-70 (1913).

B. Tax Relief Program

It is well settled that a state has very wide latitude in exercising its taxing power and in making exemptions from such taxes and that unless the classification is so palpably arbitrary and irrational that it serves no legitimate state interest, the courts will not interfere in such matters. Any ground of difference having a fair and substantial relation to the object of the legislation is all that is required to sustain such classification, since all persons similarly situated are treated alike. *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U. S. 232, 237 (1890); *Rogers v. Hennepin County*, 240 U. S. 184, 191 (1916); *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37, 40 (1928); *Allied Stores v. Bowers*, 358 U. S. 522, 526-528 (1959). In the latter case, the court found that exempting non-residents' merchandise in storage was a valid exercise of tax power by the state. The constitutional principles pertaining to a state's taxing authority was well stated by the Court in *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 509-510 (1931):

"It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. (Citation omitted). This Court has re-

peatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. (Citations omitted).

"Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. *It may make distinctions of degree having a rational basis*, and when subjected to judicial scrutiny they must be presumed to *rest on that basis if there is any conceivable state of facts which would support it*. (Citations omitted).

"This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. . . ." (Emphasis added).

The proper question is therefore whether the offering of a tax incentive to parents who expend their own funds on tuition of their children and thereby save the state substantial expenditure is a rational basis for granting such parents a modification in gross taxable income for a small fraction of the savings inuring to the state.

The time may have arrived for a soul-searching examination into whether the "establishment" clause with all of the judicial gloss placed on it need be further expanded to stifle the will of the democratic organs to offer minimal assistance to parents who choose the nonpublic school over the public school. (See Concurring Opinion of Harlan, J., in *Waltz v. Tax Commission*, 397 U. S. 690, 699 (1970).

It is respectfully submitted that this Court need not be the one to erect a barrier to the ability of parents to effectively exercise their constitutional prerogatives.

POINT V

Sections 3, 4 and 5 of Chapter 414 respecting tax relief for middle income families is severable from Section 2 which provides for tuition reimbursement payments.

The District Court held that Sections 3, 4 and 5 of Chapter 414 are severable from Sections 1 and 2. The lower Court's finding is based upon *Tilton v. Richardson, supra*, and *Champion Refining Co. v. Corporation Commission*, 286 U. S. 210, 234 (1932). Of particular significance is the severability clause (§11) of the Act, which provides:

"If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered."

It is submitted that the dissenting opinion of Judge Hays is not persuasive in finding that the New York State Legislature did not intend the middle income tax relief program to be severable from the low-income tuition reimbursement program. Judge Hays' position is directly contrary to the express legislative direction in Section 11.

Appellants in their Brief have taken a very constricted view of the severability clause by arguing that it is intended solely to preserve parts 4 and 5 of the Act. Appellants claim the programs provided for in those parts are predicated on the invalidation of the health, welfare and safety grants, the tuition reimbursement grants and the tax relief program.

There is no basis for this conclusion. Part 4 (Sections 6 and 7) of Chapter 414 provides a limited amount of aid for two years to impacted public schools who must absorb additional pupils as a result of nonpublic school closings or curtailment of grade levels. Part 5 (Sections 8-10) provides that State aid

may be apportioned for the purchase of existing buildings. These programs are part of the State's 1972 education program to partially alleviate the fiscal constraints on local school districts. Certainly, they were not intended as a substitute for Sections 1, 2 and 3 thru 5 of the Act. The State appropriations for these three programs in the 1972-73 State Fiscal year were \$4 million, \$15 to 25 million and \$10 to 15 million, respectively. Whereas, the appropriation for Part 4 of Chapter 414 was only \$2 to 3 million and no appropriation was provided for Part 5.

POINT VI

Legislative bodies and political institutions should not be curtailed in their constitutional right to a free and open debate of issues touching on religion.

The exercise of such fundamental rights as Freedom of Speech and Expression and the reserved sovereign powers of the states are endangered by the opinion of the Federal District Court in this case. In declaring unconstitutional Section 1 of Chapter 414 of the 1972 Laws of New York State, the Court implied that the Establishment Clause of the First Amendment was breached since this legislation . . . "would encourage future divisive debate on religious lines". The Court stated that "The political pressures on the Legislature are bound to be strong along religious lines." As authority for this proposition, the Federal District Court relied on the statements of this Court in *Lemon, supra*, 403 U. S. at 623.

Traditionally, state legislative bodies and other political institutions have exercised the right to free and open debate of any subject or issue no matter how politically divisive it may be on segments of our society.

It is submitted that "political divisiveness" should not be relied on as a basis for curtailing legislative debate and enactment of legislation respecting issues of a religious nature. Judicial adherence to such a concept may well lead to the resolution of peculiarly volatile social, political and economic is-

sues outside the framework of our democratic process in a manner that is "extra-legal".

The narrow decision in *Lemon* must not foreclose state legislatures from the consideration of other possible and permissible routes of programming nonpublic school aid. Certainly it is the task of the state legislatures, with the guidance of this Court, to evolve the boundaries of constitutional permissibility.

CONCLUSION

It is in the interest of the State of New York to insure that all children regardless of race, color, religion, national origin, income level or poverty background are educated to their fullest potential. It would not be in New York State's best interest to require that all children attend public schools. Such a requirement would mean that an additional 750,000 children (approximately 18% of the total State public and nonpublic school enrollment) would move into the public school system at an operational cost of \$1400 per pupil, plus capital costs.

Many of the public schools and especially the ones in the poverty areas are already overcrowded, and an influx of any substantial number of nonpublic school children would compound current adverse pupil-teacher ratio problems. Such an influx would cost the State of New York and local school districts over \$1 billion each year in additional operating costs alone. This would aggravate the existing financial crisis in education to a breaking point.

There are other benefits flowing from the availability of nonpublic school education. These benefits include diversity in education, competition in education stimulating progress, experimentation and innovation in non-governmental schools, pluralism, prevention of State monopoly in education, freedom of education, and freedom of thought. New York State has a fine public school education, and it is essential that it continues to exist and flourish. However, a monopolized education

is not the way to accomplish this goal. (See, *Minnersville School District v. Gobitis*, 310 U. S. 598-599 (1939)).

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed with respect to Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York and affirmed with respect to Section 3, 4 and 5 thereof.

Dated: March 19, 1973

Respectfully submitted,

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APPENDIX

Session Laws of New York

Education—Nonpublic Schools—Aid

CHAPTER 414

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, effective as provided in section 12.

Passed on message of necessity. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law § 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12—HEALTH AND SAFETY GRANTS FOR
NONPUBLIC SCHOOL CHILDREN

Section

549. Legislative findings.

550. Definitions.

551. Apportionment.

552. Applications, reports, regulations.

553. Installments.

§ 549. Legislative findings

The legislature hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

2. The state discharges this responsibility to public school children through substantial amounts of per pupil financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

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3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five,¹ which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but none the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

¹ 20 U.S.C.A. § 1061 et seq.

§ 550. Definitions

In this article:

1. "Commissioner" shall mean the state commissioner of education.
2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d),¹ (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,² as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).
3. "Base year" shall mean the school year immediately preceding the current year.
4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.
5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.
6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and cus-

¹ 42 U.S.C.A. § 2000(d).

² 26 U.S.C.A. (I.R.C.1954) § 501(a), (c) (3).

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todial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session during such year.

§ 551. Apportionment

1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

*Session Laws of New York***§ 552. Applications, reports, regulations**

Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. Installments

The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July first, nineteen hundred seventy-one such apportionment shall be made in one payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A, to read as follows:

**ARTICLE 12-A—ELEMENTARY AND SECONDARY
EDUCATION OPPORTUNITY PROGRAM**

Section

559. Legislative findings.

560. Short title.

561. Definitions.

562. Tuition reimbursement payments to parents.

563. Commissioner; powers.

§ 559. Legislative findings

The legislature hereby finds and declares that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and re-

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affirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

3. Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.

4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.

5. An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition reimbursement for parents of low income, in order to provide partial assistance in meeting the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.

§ 560. Short title

This article shall be known as the "Elementary and Secondary Education Opportunity Program".

§ 561. Definitions

The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for

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nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000(d),¹ and (iii) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,² as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar year exclusive of July and August.

¹ 42 U.S.C.A. § 2000(d).

² 26 U.S.C.A. (I.R.C.1954) § 501(a), (c) (3).

§ 562. Tuition reimbursement payments to parents

1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school

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year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.

§ 563. Commissioner; powers

The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be

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payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.

2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subsection (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to

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such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragraph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

<u>If New York adjusted gross income is:</u>	<u>The amount allowable for each dependent is:</u>
Less than \$9,000	\$1,000
9,000—10,999	850
11,000—12,999	700
13,000—14,999	550
15,000—16,999	400
17,000—18,999	250
19,000—20,999	150
21,000—22,999	125
23,000—24,999	100
25,000 and over	—0—

(2) Husband and wife. In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

(3) Definitions. (A) "Tuition", as used this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d)¹ and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,² as amended. The commissioner of education shall furnish to the state

¹ 42 U.S.C.A. § 2000(d).

² 26 U.S.C.A. (I.R.C.1954) § 501(a), (c) (3).

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tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state tax commission may require.

(C) "Regular school year", as used in this subsection, shall mean the months of the taxable year exclusive of July and August.

(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.

§ 6. Legislative findings. The legislature hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils, the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps intolerable, fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

*Session Laws of New York*a. Definitions. As used herein:

1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a non-public school, or campus school, during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.

2. borough shall mean any borough of the city school district of the city of New York.

3. aid ratio shall mean the higher of the actual aid ratio established for such district or borough, or thirty-six per centum.

b. Computation. The amount to be apportioned shall be the product of:

1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and

2. the aid ratio of such school district or borough.

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ratio for each such borough.

d. Any apportionment as herein computed shall be subject to regulations promulgated by the commissioner and shall not be deducted in determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year and the school year next succeeding such year.

§ 8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having been amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively as follow:

1. No schoolhouse shall hereafter be erected, purchased, repaired, enlarged or remodeled in any school district except in a city school district in a city having seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specifications shall show in detail the ventilation, heating and lighting of such buildings.

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In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may prescribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousands dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection or purchase of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exists upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection or purchase of any school building or addition thereto or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of education shall not approve the plans for the erection or purchase of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment, accessibility; soil conditions; initial and ultimate cost.

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§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for an appraisal of such buildings as school buildings and the land on which they are situated¹ as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.

¹ So in original. Probably should read "situated".

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two hundred thirty-four of the laws of nineteen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, purchase of existing structures, for site purchase and im-

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provement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs incidental to such construction or reconstruction, or purchase of existing structures.

a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction and the purchase of existing structures the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven through nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the costs of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction and the purchase of existing structures may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

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§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two and the provisions of paragraph (14) of subsection (e) of section six-hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.

IN THE
Supreme Court of the United States

October Term, 1972

Nos. 72-694, 72-753, 72-791, 72-929

Supreme Court, U.S.
FILED

NOV 28 1972

RECEIVED DEPT. OF JUSTICE

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellants,

v.

EWALD B. NYQUIST *etc. et al.*,

Appellees;

WARREN M. ANDERSON, as Majority Leader and President
pro tem of the New York State Senate,

Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees;

EWALD B. NYQUIST *etc. et al.*,

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COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF for APPELLEES BOYLAN, DUCEY,
FERRARELLA and ROOS and for APPELLANTS
CHERRY, FERGUSON and RUIZ**

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IN THE
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October Term, 1972

Nos. 72-694, 72-753, 72-791, 72-929

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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**BRIEF for APPELLEES BOYLAN, DUCEY,
FERRARELLA and ROOS and for APPELLANTS
CHERRY, FERGUSON and RUIZ**

It was agreed by all parties, with the approval of the Clerk of this Court, that each party or distinct group of parties would file one brief on the merits of all four of these consolidated appeals. This brief is submitted on behalf of appellees Boylan, Ducey, Ferrarella and Roos in appeal 72-694 and appellants Cherry, Ferguson and Ruiz in appeal 72-929, all of whom are parents of nonpublic school children who intervened as parties defendant in the District Court.

Opinions Below

The opinions of the District Court, upon which the judgment appealed from was entered, are reported at 350 F. Supp. 655 *et seq.* Copies of the opinions are also set forth in the Appendix to the Jurisdictional Statement of appellant Cherry *et al.* [hereinafter "JSA"] at pages 1a and 40a. In addition, an earlier per curiam opinion is set forth at page 46a.

Jurisdiction

This suit was brought pursuant to 28 U.S.C. §§ 1343(3), 2281 and 2284 to enjoin the enforcement of a statute of the State of New York as being in violation of the First Amendment to the United States Constitution. The judgment of the District Court was entered on October 20, 1972. Appellants Cherry, Ferguson and Ruiz filed their Notice of Appeal on October 27, 1972 and their Jurisdictional Statement on December 26, 1972. On January 22, 1973, this Court noted probable jurisdiction.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by 28 U.S.C. §§ 1253, 2101(b). Recent cases sustaining the jurisdiction of this Court to review this case on direct appeal

are *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U.S. 602 (1971), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

Constitutional Provision and Statute Involved

The First Amendment reads, in pertinent part, as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

The statute involved is Chapter 414 of the 1972 Laws of New York, entitled "An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings." N.Y. Educ. Law §§ 408(1), 408(2), 408(3), 408(6), 549-53, 559-63, 3602(6), 3602(15), (McKinney Cum. Supp. 1972); N.Y. Tax Law §§ 612(c)(14), 612(j) (McKinney Cum. Supp. 1972). The full text of the statute [hereinafter referred to as "Chapter 414"] is set forth both in the Appendix to this brief¹ and at JSA, p. 55a *et seq.*

Chapter 414 is an omnibus statute, and each of its substantive sections under review herein must be considered independently of the others.

Section 1 requires the Commissioner of Education of the State of New York to make health, welfare and safety

¹ Hereinafter "BA".

A three-judge District Court was convened, consisting of Judge Paul R. Hays of the Court of Appeals for the Second Circuit and Judges John M. Cannella and Murray I. Gurfein of the District Court. No discovery or trial was had. The case was briefed and argued to the court on July 6, 1972.

On July 21, 1972, the District Court handed down a per curiam opinion that Section 1 of Chapter 414 violates the Establishment Clause. Thereafter, on October 2, 1972, Judge Gurfein handed down an opinion, concurred in by Judge Cannella, explaining in detail the reasons for the court's conclusion with respect to Section 1. The opinion further concludes that Section 2 is violative of the Establishment Clause. On the other hand, the court concluded that the tax modification part of Chapter 414 (§§ 3-5) "is not in conflict with the First Amendment Establishment Clause, as applied to the states through the Fourteenth Amendment." 350 F.Supp. at 673; JSA, p. 38a. Judge Hays concurred with respect to Sections 1 and 2, but dissented with respect to Sections 3-5. Judgment was entered, permanently enjoining enforcement of Sections 1 and 2, while granting defendants' and intervenor-defendants' motion for summary judgment dismissing the complaint with respect to Sections 3, 4 and 5. *See* JSA, pp. 48a-51a.

Pearl appealed from so much of the judgment as dismissed its complaint with respect to Sections 3-5. Docket No. 72-694. The defendant state officials and Senator Brydges separately appealed from that part of the judgment permanently enjoining enforcement of Sections 1 and 2.⁴ Docket Nos. 72-791 and 72-753. Appellants Cherry, Ferguson and Ruiz appealed from so much of the judgment

⁴ Senator Brydges's position as Majority Leader and President Pro Tem has since been assumed by Senator Warren M. Anderson, who has been duly substituted as a party herein.

as declares that Section 2 of Chapter 414 violates the Establishment Clause and permanently enjoins its enforcement.⁵ Docket No. 72-929. This Court's order of January 22, 1973, noting probable jurisdiction, consolidated all four appeals. See Appendix, p. 80a.

⁵ The parents who intervened in the District Court in support of the constitutionality of Sections 2-5 of Chapter 414 had no standing to intervene in support of Section 1 and thus to appeal from the judgment thereon. The question of the constitutionality of that section is therefore not specifically dealt with in this brief.

Summary of Argument As to Limited Tax Relief*

Section 5 of Chapter 414 provides for a modification of adjusted gross income which is materially dissimilar to a tax exemption or tax credit and is not an ordinary deduction. The principal effect of this provision is to alleviate somewhat the burden on certain taxpayers who choose to pay to send their children to nonpublic schools.

State legislatures have broad discretion to make classifications and distinctions in the exercise of their taxing powers, and this Court has always recognized this so long as the legislation has a rational basis. Section 5 has a number of rational bases, including the giving of some recompense by way of tax relief to taxpayers who bear their share of the burden of maintaining public education and yet send their children to nonpublic school, the holding down of the tax burden on all taxpayers and the maintaining of public education at at least its present level.

Section 5, as the District Court majority concluded, has a secular purpose and primary effect and is devoid of any state entanglement with religion. Since this Court concluded in *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970), that exemption of churches from taxation does not constitute an establishment of religion, Section 5, which provides a limited tax benefit to individual taxpayers who have relieved the state (and other taxpayers) of the burden of educating their children, cannot be so interpreted. There is no genuine nexus between slight tax relief under such circumstances and establishment of religion.

* The Summary of Argument with respect to tuition reimbursement (Section 2 of Chapter 414) is set forth at page 22, *infra*.

ARGUMENT AS TO LIMITED TAX RELIEF

THERE IS NO GENUINE NEXUS BETWEEN MODIFICATION OF THE ADJUSTED GROSS INCOMES OF INDIVIDUAL TAXPAYERS PURSUANT TO SECTION 5 AND ESTABLISHMENT OF RELIGION

The District Court's majority opinion sets forth five specific reasons for its conclusion that the tax modification part of Chapter 414 (§§ 3-5) is not in conflict with the Establishment Clause, to wit:

... In the first place, it ... covers attendance at *all* nonprofit private schools *in the State*.

Second, it does not involve a subsidy or grant of money *from the State Treasury* ...

Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. ...

Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools.

Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is ... ongoing political activity as likely ... to cause division on strictly religious lines.⁷

Section 5 Has a Secular Purpose and Primary Effect and Is Devoid of Any State Entanglement With Religion

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court summarized the tests applicable to a determination of constitutionality under the Establishment Clause:

⁷ 350 F.Supp. at 670-71; JSA, pp. 31a-32a (set apart for ease in reading; emphasis in original).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion." . . .⁸

Secular Purpose

Section 3 of Chapter 414 sets forth the New York Legislature's findings with respect to the modification provided for by Section 5. *See* BA, pp. 12a-13a; JSA, pp. 66a-67a. The District Court stated:

. . . we accept these findings . . . They sum up legislative purposes which are cast as secular in intent.⁹

. . . [Section 5] has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right.¹⁰

Indeed, *Pearl* concedes that Section 5 has a secular legislative purpose: Section 3, among others, "contains a long recital of secular legislative purposes and in view of this Court's apparently firm policy of taking such recitals at face value, it would probably be fruitless to seek to show that there is less secularity . . . than meets the eye." Brief for Appellants, p. 14.

⁸ 403 U.S. at 612-13. *See also* *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

⁹ 350 F.Supp. at 659; JSA, p. 7a.

¹⁰ 350 F.Supp. at 670-71; JSA, pp. 31a-32a.

This Court stated in upholding the constitutionality of New York's exemption of religious institutions from real property taxes that "[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility."¹¹ Although concluding that the statutes involving teachers' salaries in *Lemon v. Kurtzman* violated the Establishment Clause, this Court nevertheless found that "[i]nquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion." 403 U.S. at 613. Inquiry into the legislative purpose of Section 5 affords no more of a basis for such a conclusion in this case.

*Principal Effect Is
Partial Alleviation
of Taxpayers' Burden*

Two "main evils" against which the Establishment Clause was intended to afford protection are sponsorship and financial support of religious activity on the part of government. See *Lemon v. Kurtzman*, 403 U.S. at 612. In *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970), this Court concluded, among other things:

... We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions. 397 U.S. at 673.

¹¹ *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 672 (1970). In a concurring opinion, Justice Brennan stated that:

Government has two basic secular purposes for granting real property tax exemptions to religious organizations. First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways . . .

Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society . . . 397 U.S. at 687, 689.

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . . There is no genuine nexus between tax exemption and establishment of religion. 397 U.S. at 675.

Nothing in . . . two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion . . . 397 U.S. at 678.

If complete exemption of houses of worship from taxation cannot be interpreted as attempting to establish religion, can a tax provision significantly less pervasive—a mere modification—benefiting individual taxpayers be so interpreted? The District Court could not do so.

The New York State personal income tax is based, in general, on the federal income tax. Thus, the "New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section." N.Y. Tax Law § 612(a). Section 5 of Chapter 414 is one of some 16 such modifications presently specified. *See* N.Y. Tax Law § 612(c). It is not an exemption from the payment of any income taxes as provided by Section 501 of the Internal Revenue Code¹³ or from the payment of any municipal taxes as provided by Section 1230 of the New York Tax Law or from the payment of any real property taxes as provided by Section 421.1(a) of the New York Real Property Tax Law. Not only do these statutes provide full immunity from taxation, they exempt organizations operated "*exclusively for religious . . . purposes,*" not individual taxpayers.

Section 5 also does not provide for a "deduction" as that term is commonly understood and applied. Taxpayers are

¹³ 26 U.S.C. §501.

entitled to deduct amounts from their gross incomes equal to various expenses they have incurred in a given year, including, for example, ordinary and necessary business expenses, interest paid, local taxes, even contributions made to churches. *See* 26 U.S.C. §§162-64, 170. Indeed, the District Court pointed out:

... It has been a consistent legislative policy ever since the 1917 Revenue Act for the Congress to permit the deduction of so-called charitable contributions from personal income. This has always included direct gifts to churches. 350 F.Supp. at 672; JSA, p. 34a (footnote omitted.)

Under Section 5, on the other hand, the amounts which qualified taxpayers may subtract vary according to their federal adjusted gross incomes and the number of children (not exceeding three) attending nonpublic schools as follows:

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than \$9,000	\$1,000
9,000 — 10,999	850
11,000 — 12,999	700
13,000 — 14,999	550
15,000 — 16,999	400
17,000 — 18,999	250
19,000 — 20,999	150
21,000 — 22,999	125
23,000 — 24,999	100
25,000 and over	-0-

In stating that "Chapter 414 is not a tax deduction statute,"¹³ *Pearl* would have this Court believe that Section 5 will always entitle taxpayers to modify their adjusted gross incomes by amounts greater than those expended to send their children to nonpublic schools, that is, that modifi-

¹³ Brief for Appellants, p. 40.

cation pursuant to Section 5 will always be a more liberal factor in computing one's income taxes than a straight deduction would be. *See* Brief for Appellants, p. 41. This is clearly not so. If appellee Boylan, for example, who paid a total of \$700.00 to send her two children to nonpublic school last year,¹⁴ had an adjusted gross income of \$17,000, she would be entitled to subtract only \$500 from that adjusted gross income before proceeding to determine her tax liability; if \$20,000, then only \$300. On the other hand, even if appellee Boylan's New York adjusted gross income were low enough to entitle her to subtract an amount greater than the \$700.00 she actually paid in tuition, say \$10,700 (thereby entitling her to subtract \$1,700 from the \$10,700 for her two children), her net tax benefit would be \$96¹⁵ as opposed to the \$700.00 previously paid.

Just as clearly as Section 5 is not an exemption or a deduction, neither is it a tax credit. A tax credit is generally a fixed sum bearing no direct relationship to either the income of a taxpayer or his tax liability. The government merely forgives part of that liability once it has been determined. For example, last year, an individual New York taxpayer was entitled to an across-the-board credit of \$12.50 against his income tax (\$25.00 for married persons)¹⁶ irrespective of his income or the tax owed. The difference between the significance and effect of a tax credit as opposed to a tax liability factor such as a deduction is perhaps best illustrated by the Internal Revenue Code's new provisions with respect to contributions to candidates for public office, 26 U.S.C. §§41, 218. Under these sections, a taxpayer has the option of either deduct-

¹⁴ *See* Appendix, p. 26a.

¹⁵ Based on a family of four. *See* N.Y. Tax Law §§ 602(b), 616 (McKinney Cum. Supp. 1972).

¹⁶ N.Y. Tax Law §606(a) (McKinney Cum. Supp. 1971, repealed, [1972] Laws of N.Y. ch. 1, §6).

ing an amount contributed or taking a tax credit. If, for example, an individual taxpayer with an otherwise taxable income of \$8,000 contributed \$25 last year to a political candidate, he could deduct the \$25 pursuant to Section 218, thereby resulting in a taxable income of \$7,975 and a tax liability of \$1,584. See 26 U.S.C. §1(c). On the other hand, if the same taxpayer opted for the tax credit (in the amount of \$12.50) pursuant to Section 41, his tax liability would be \$1,590¹⁷ less \$12.50 or \$1,577.50. Obviously, subtraction of a given amount from adjusted gross income, such as is provided for by Section 5 of Chapter 414, is not the same as a tax credit,¹⁸ and it is misleading for *Pearl* to argue otherwise. See, e.g., Brief for Appellants, pp. 40-41.

In sum, the modification provided for by Section 5 is neither a tax exemption nor a credit and can often amount to even less than a deduction. The extent and effect of the resultant benefit to individual taxpayers is therefore clearly limited.

The exemption of church property from taxation "necessarily operates to afford an indirect economic benefit." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. at 674. Also:

¹⁷ See 26 U.S.C. §1(c).

¹⁸ For examples of tax credit statutes, see [1971] Laws of Minn. ch. 944, Minn. Stat. §§ 290.086, 290.087; Ohio Rev. Code §§ 5703.052, 5747.05, 5747.111 (1972 Page's Current Service No. 3). By way of comparison, the Ohio statute entitles taxpayers who pay to send children to school, including public schools, to a tax credit of up to \$90.00. This enactment has been held unconstitutional by a three-judge federal District Court. See *Kosydar v. Wolman*, — F.Supp. — (S.D. Ohio, Dec. 29, 1972), appeal docketed Feb. 16, 1973, No. 72-1139. On the other hand, the Minnesota statute has been held "valid under both the United States and Minnesota Constitutions." *Minnesota Civil Liberties Union v. State of Minnesota*, File Nos. 379526, 380252 (D.C. Ramsey Cty, July 6, 1972), opinion reproduced in full in original form as Appendix B to Doc. No. 21, Record on Appeal herein.

... For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. Such treatment is an “aid” to churches no more and no less in principle than the real estate tax exemption granted by States.¹⁹

However, Section 5 is, as the District Court observed, a “step removed.” 350 F.Supp. at 672; JSA, p. 34a. That is, whereas tax exemption applies to churches, Section 5 applies to individual taxpayers. Thus, if tax exemption results in only an indirect benefit to religion, it is difficult to discern even an indirect benefit to *religion* under Section 5, let alone the advancement thereof as the *principal* or *primary* effect. As for benefit to nonpublic schools, to quote again from the District Court’s majority opinion above, “the benefit . . . if any, is so remote as not to involve impermissible financial aid to church schools.”²⁰

The reason for the District Court’s inability to find any financial support of religious activity by Section 5 is clear, namely, Section 5 “does not involve a subsidy or grant of money from the State Treasury.” 350 F.Supp. at 670; JSA, p. 31a (emphasis in original). Cf. *Walz v. Tax Comm’n of the City of New York*, 397 U.S. at 675. Section 5 is no more a “subsidization”²¹ than are deductions for extraor-

¹⁹ *Walz v. Tax Comm’n of the City of New York*, 397 U.S. at 676 (footnote omitted).

²⁰ 350 F.Supp. at 671; JSA, p. 32a (emphasis added). *Pearl* has concocted a “profile” with respect to these schools, one which it concedes may actually fit “few schools in New York.” Brief for Appellants, p. 19. See *id.* at p. 5. Indeed, there is little in the record in this case, save mere allegations, tending to support *Pearl*’s “profile”, and this fact is perhaps the reason for this Court’s refusal to rely on such unfounded assumptions in cases such as this. See, e.g., *Tilton v. Richardson*, 403 U.S. at 682. Then again, Section 5 applies to individual taxpayers, not nonpublic schools, to begin with.

²¹ Brief for Appellants, p. 42.

dinary medical expenses²² or for interest on a home mortgage or for the innumerable other significant expenses taxpayers incur and of which both Congress and the New York State Legislature have chosen to take particular cognizance in the tax laws. It hardly can be argued that medical expense deductions provide a state subsidy of the medical profession or that mortgage interest deductions subsidize banks. Furthermore, there can be no question but that the principal or primary effect of any of these subtractions, including Section 5, is the partial alleviation of the tax burden on individual taxpayers.

*Involvement Between Church
and State Under Section 5
Is Nonexistent*

The third "main evil" against which the Establishment Clause was intended to afford protection is "active involvement of the sovereign in religious activity." *Lemon v. Kurtzman*, 403 U.S. at 612; *Walz v. Tax Comm'n of the City of New York*, 397 U.S. at 668. And the degree of such involvement must be "excessive" before the relationship between church and state is unconstitutional. In *Walz*, for example, this Court stated:

... the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. 397 U.S. at 675.

Application of this standard to tax exemption of churches in *Walz* resulted in a conclusion that:

... The exemption creates only a minimal and remote involvement between church and state ... It ... tends to complement and reinforce the desired separation insulating each from the other. 397 U.S. at 676.

²² See 26 U.S.C. §213.

grants to schools serving a high concentration of pupils from low-income families in amounts "equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school[s], to be applied for costs of maintenance and repair."²

Section 2 requires the Commissioner of Education to make tuition reimbursement payments to parents of pupils enrolled full-time in nonpublic schools whose New York taxable income is under five thousand dollars and who have paid \$20.00 or more tuition to such schools in a given calendar year. These payments are to be the lesser of either (a) 50 per cent of the tuition paid or (b) \$5 per month for the period of enrollment of pupils in grades 1-8 or \$10 per month for the period of enrollment of students in grades 9-12.

Section 5 entitles a taxpayer to subtract from his federal adjusted gross income, in computing his New York adjusted gross income, a sliding-scale amount multiplied by the number of his dependents, not exceeding three, attending a nonpublic school, provided such taxpayer is allowed an exemption for such dependent, has paid at least \$50.00 for each such dependent in tuition to the nonpublic school, has not claimed a tuition reimbursement payment pursuant to Section 2 and has a New York adjusted gross income, without the benefit of the foregoing modification, of less than twenty-five thousand dollars.³

² This formula is increased to \$40 for schools built prior to 1947.

³ The remaining substantive sections (7-10) of Chapter 414 are not involved in any of these four consolidated appeals. Section 7 entitles public school districts which experience increases in student enrollment because of closings of nonpublic schools to financial aid. Sections 8-10 establish procedures for the purchase of existing, closed nonpublic school buildings by public school districts.

Questions Presented

1. Whether the Establishment Clause of the First Amendment permits the New York Legislature to lessen the state income tax burden on taxpayers with children attending nonpublic schools.

2. Whether the Establishment Clause permits partial reimbursement by New York State of low-income parents for tuition they pay to send their children to nonpublic schools.

Statement of the Case

The Committee for Public Education and Religious Liberty [hereinafter referred to as "*Pearl*"] and 19 individuals instituted this action against Ewald B. Nyquist, Arthur Levitt and Norman Gallman in their respective capacities as Commissioner of Education, Comptroller and Commissioner of Taxation and Finance of the State of New York, praying that enforcement of Sections 1 through 5 of Chapter 414 be permanently enjoined on the ground, *inter alia*, that these sections on their face violate the Establishment Clause. Appellants Cherry, Ferguson and Ruiz were permitted to intervene as parties defendant on the ground that they are parents of nonpublic school children who qualify for reimbursement pursuant to Section 2. Appellees Boylan, Ducey, Ferrarella and Roos were permitted to intervene as parties defendant on the ground that they are parents of nonpublic school children who qualify for modification of their New York adjusted gross incomes pursuant to Section 5. In addition, Senator Earl W. Brydges was permitted to intervene as a party defendant in his capacity as Majority Leader and President Pro Tem of the New York State Senate.

In this case, there is not even a minimal and remote involvement between church and state, and the District Court did not find otherwise. *See* 350 F.Supp. at 673; JSA, p. 37a. The relationship under Section 5 is between taxpayer and state. And this relationship did not arise as a result of enactment of Section 5; it has existed ever since New York first enacted a personal income tax. Furthermore, application of Section 5 is no different (or more entangled) than that for any of the other modifications permitted by Section 612(c) of the New York Tax Law. A taxpayer simply determines whether he is eligible for a modification under Section 5 and, if so, the amount thereof, which he then enters and subtracts on his income tax return as explained on page 6 of this year's instruction booklet to all New York taxpayers, part of which appears as follows:

Line 4 / Subtractions

Enter on Line 4 the amount of these subtractions from your total Federal income and explain each item in Schedule C on Page 2.

- 1 Subtract the amount shown in the table below for dependent students on whose behalf you paid tuition of at least \$50 each for attendance at a nonpublic school in NY State. To qualify the student must be in grades 1 through 12, on a full-time basis for at least 4 months of the regular school year. You may claim this subtraction on behalf of no more than 3 dependent students and cannot claim this subtraction if you claim a tuition reimbursement payment pursuant to the Education Law.

*If NY Adjusted Gross Income without this Subtraction is:	Subtract on Line 4 if you have:		
	1 qualified student	2 qualified students	3 qualified students
Less than \$9,000	\$1,000	\$2,000	\$3,000
\$ 9,000 to 10,999	850	1,700	2,550
11,000 to 12,999	700	1,400	2,100
13,000 to 14,999	550	1,100	1,650
15,000 to 16,999	400	800	1,200
17,000 to 18,999	250	500	750
19,000 to 20,999	150	300	450
21,000 to 22,999	125	250	375
23,000 to 24,999	100	200	300
25,000 and over	0	0	0

*This is Total New York Income which would be reported on Line 5 except for this subtraction.

ported as inc. York State retui. 16 of the Tax Law an estate or a trust, such income or gain

- 7 Any interest or dividend in your total Federal securities which are under New York law.
- 8 Any refund or credit income tax include income. For example, New York State income 1972 and include income, you should Line 4.

If filing Form refund or credit tax is made or wife's column 1 wife included separately determine in Schedule A on

- 9 Interest on money or carry bonds or New York State income from Federal income was a 1972 business or deducted in computing income.
- 10 Ordinary and necessary paid or incurred during with income, or production of income, New York State income

Not only is Section 5 totally devoid of any involvement between church and state, it also does not entail any "divisive political potential,"²³ a fact which the District Court recognized. *See* 350 F.Supp. at 673; JSA, p. 37a. Surely, if "a page of history is worth a volume of logic"²⁴ and for over two centuries the states have exempted churches from taxation and for over half a century direct contributions to churches have been tax deductible without any manifestations of political divisiveness, can it be argued that Section 5 involves a potential for political divisiveness? We think not.

State Legislatures Have Wide Discretion in the Exercise of Their Taxing Powers

The District Court quite properly stated its awareness of the fact that plaintiffs' complaint²⁵ does not specifically challenge Section 5 on equal protection grounds. *See* 350 F.Supp. at 673; JSA, pp. 36a-38a. Indeed, *Pearl* is forced to concede that "legislatures have wide discretion in allowing deductions, credits and exemptions." Brief for Appellants, p. 43.

A state does have wide discretion in the exercise of its taxing powers, and unless a classification is obviously arbitrary and irrational in that it serves no legitimate state interest, courts will not interfere. Any basis of difference having a fair and substantial relation to the object of the legislation is all that is required to sustain the classification so long as all persons similarly situated are treated alike. *See, e.g., Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-28 (1959); *Louisiana Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37, 40 (1928); *Rogers v. Hennepin County*, 240

²³ *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

²⁴ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); *Wals v. Tax Comm'n of the City of New York*, 397 U.S. at 675-76.

²⁵ *See generally* Appendix, pp. 7a-15a.

U.S. 184, 192 (1916); *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), this Court stated:

... It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. . . .

Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. *It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.* . . .

This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. . . .

... The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods. 301 U.S. at 509, 510, 514-15 (emphasis added, citations omitted).

The question thus is whether partial alleviation of the burden on taxpayers who support public education, but who choose to send their children to nonpublic schools and thereby benefit to a markedly lesser degree from public education, has any rational basis. The District Court found

that it has, to wit, "one of equity." 350 F.Supp. at 670; JSA, p. 31a.

While it is undoubtedly true, in general, that taxes are not assessments based on direct or indirect benefits to individual taxpayers, but rather are the means of distributing the burden of the cost of government, it is neither irrational nor unusual to provide some relief to those persons who benefit to a lesser degree from a given tax than do other taxpayers. For example, New York City taxes the earnings of nonresidents at a different rate than those of residents. Compare Section U46-2.0 of the New York City Administrative Code²⁶ with Section T46-3.0. Under the Internal Revenue Code, up to \$25,000 of income earned by a United States citizen who is a bona fide resident of a foreign country can be excluded from income taxation. See 26 U.S.C. § 911(c)(1)(B).

There are, of course, other rational reasons for enactment of Section 5 which are wholly unrelated to the establishment of religion. Two very important ones are the holding down of the already severe tax burden on *all* taxpayers and the maintaining of *public* education at at least its present level. The New York Legislature, in enacting Section 5, made a specific finding that:

[Nonpublic] educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children. BA, p. 13a; JSA, p. 67a.

In summary, then, we submit that there is no genuine nexus between modification of the adjusted gross incomes of individual taxpayers pursuant to Section 5 and establishment of religion and that the District Court was correct in dismissing *Pearl's* complaint with respect thereto.

²⁶ Vol. 5A.

Summary of Argument As to Tuition Reimbursement

Section 2 of Chapter 414 is carefully limited to meeting a pressing problem of low-income parents (and their children) who would otherwise be denied the freedom of educational choice possessed by more affluent members of our society. It is significantly different from tuition reimbursement statutes in Ohio and Pennsylvania which have come under review by this Court, but rather is analogous to numerous other federal and state enactments tending to enhance the general welfare of families near or below the poverty level.

Applying this Court's controlling tests, as summarized in *Lemon v. Kurtzman* and *Tilton v. Richardson*, to Section 2 shows not only that it has a secular purpose, a fact conceded by *Pearl*, but also that its principal or primary effect is neither to advance nor to inhibit religion; rather, it is to nurture a pluralistic society, just as is done by innumerable other federal and state laws relating to the general health, education and welfare of the least affluent members of society. There is and can be no excessive entanglement with religion on the part of the state under Section 2 since the mechanism for its enforcement is the already-existing relationship of taxpayer and state.

While Section 2 clearly seeks to enhance the welfare of individuals and not institutions, the District Court erroneously based its decision upon those individuals' right to the free exercise of religion, a right which is not the controlling constitutional basis and which the intervenor-parents actually before the Court did not press as controlling the constitutionality of Section 2.

ARGUMENT AS TO TUITION REIMBURSEMENT

THE VITALITY OF OUR PLURALISTIC SOCIETY IS DEPENDENT UPON THE CAPACITY OF INDIVIDUAL PARENTS TO SELECT A SCHOOL, OTHER THAN PUBLIC, FOR THE EDUCATION OF THEIR CHILDREN; SECTION 2 OF CHAPTER 414 SERVES TO PRESERVE THIS CAPACITY FOR LOW-INCOME PARENTS

A New York parent is not required to send his children to public schools. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Instead, he may send his children to nonpublic schools, so long as the instruction provided is "at least substantially equivalent"²⁷ to that given in the public schools. Thus, as of the fall of 1968, there were 1,415 Roman Catholic, 164 Jewish, 59 Lutheran, 49 Episcopal, 37 Seventh Day Adventist and 18 other religiously-affiliated nonpublic schools²⁸ in New York. There were also 296 nonpublic schools with no religious affiliations. *See N.Y. State Educ. Dep't, Financial Support—Nonpublic Schools—New York State 3* (1969).

In 1968-69, well over half (61.6 percent) of the pupils enrolled in nonpublic schools in New York State attended schools in the "Big Six" cities of Albany, Buffalo, New York, Rochester, Syracuse and Yonkers. . . . New York City alone had slightly more than half the enrollment (51.4 percent), and an additional 10.2 percent was accounted for by the other large cities (Buffalo, 4.3 percent; Rochester, 1.9 percent; Albany, 1.5 percent; Yonkers, 1.3 percent; Syracuse, 1.2 percent).²⁹

²⁷ N.Y. Educ. Law § 3204.2.

²⁸ Includes schools affiliated with Society of Friends, Mennonite, Greek Orthodox, Russian Orthodox, Methodist and Baptist churches.

²⁹ N.Y. State Educ. Dep't, *Financial Support—Nonpublic Schools—New York State 4* (1969).

Approximately 20% (800,000) of all school children in New York State attend nonpublic schools. Of these 800,000 children, a substantial number come from families near or below the poverty level. While exact figures are not available, it has been reliably estimated that there are presently about 70,000 families with children enrolled in Catholic schools in New York City alone and taxable incomes of less than \$5,000 per year:

... The father is usually a blue or white collar worker, more frequently found in the unskilled areas of work than performing professional tasks. He is in a stable marriage union to a woman who works at home. The mother seems to move into the market place as a full time worker when she sends her children to Catholic high school. These Catholic school parents in New York City, far from being affluent, earn a modest income . . .

The take-home pay of such families illustrates the economic struggle going on within these homes. About one quarter took home less than \$100 per week and more than three out of every five families (62 per cent) cleared less than \$150.00. In some New York counties, where large numbers of Negroes and Spanish had children in parochial schools, the economic picture was somewhat darker. In Manhattan, for example, 41 per cent reported less than \$100 weekly and 77 per cent less than \$150.³⁰

Out of 65,937 pupils enrolled last year in Catholic elementary schools in the Bronx, Manhattan and Staten Island, 30,922 were non-white. "Today, more than 60 percent of [Catholic nonpublic school] elementary school students in Manhattan are black or Spanish-speaking; 30 percent of them in the Bronx." *Hearings on H. R. 16141 and Other*

³⁰ Kelly, *The "Nearly Poor Catholics" in New York City*, 1 St. John's Univ., N.Y. Research Bulletin 2 (Jan., 1972).

Pending Proposals Before Committee on Ways and Means, 92nd Cong., 2d Sess., pt. 3, at 583 (Sept. 7, 1972).

In view of these and other related facts, the Legislature enacted Section 2 of Chapter 414, based upon findings that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated. N.Y. Educ. Law § 559.1 and 2, BA, p. 7a; JSA, p. 61a.

The District Court stated:

... we accept these findings ... They sum up legislative purposes which are cast as secular in intent ... we must start with the assumption that the Legislature intended to provide a quality education for all children and to nurture a pluralistic society ...

In sum, we do not go behind the statements of the New York Legislature ... 350 F.Supp. at 659-60; JSA, pp. 7a-8a.

Section 2 Uniquely Enhances the General Welfare

Section 2 requires the Commissioner of Education to make tuition reimbursement payments to parents of pupils enrolled full-time in nonpublic schools whose New York taxable income is under five thousand dollars and who have paid \$20.00 or more in tuition to such schools in a given calendar year. These payments are to be the lesser of either

(a) 50 per cent of the tuition paid or (b) \$5 per month for the period of enrollment of pupils in grades 1-8 or \$10 per month for the period of enrollment of students in grades 9-12.

Appellant Cherry, who is divorced, has two sons who attend a nonpublic high school in Brooklyn. Their combined tuition for the school year 1971-72 was approximately \$500.00. *See* Appendix, p. 28a. Under Section 2, she would be entitled to a total reimbursement of \$200 for the year. Appellant Ferguson has a daughter who also attends a nonpublic high school in Brooklyn. Appellant Ferguson, a widow on pension who had a New York taxable income of less than \$1,000 for 1971, paid \$700.00 in tuition for the past school year. *See id.* at 34a. Under Section 2, she would be entitled to be reimbursed in the amount of \$100. Appellant Ruiz has two daughters who attend nonpublic high schools in Manhattan. She paid \$40.00 tuition per month for the school year 1971-72. *See id.* at 38a, 39a. She is now paying \$100.00 per month. Under Section 2, she would be entitled to a total reimbursement of \$20 per month.

Section 2 differs significantly from tuition reimbursement statutes which have recently come under review in Ohio and Pennsylvania. In *Wolman v. Essex*, 342 F.Supp. 399 (S.D. Ohio), *aff'd*, 409 U.S. 808 (1972), a three-judge District Court held that the "parental financial grants" contemplated in Section 3317.062 of the Ohio Revised Code violate the Establishment Clause. But the Ohio statute was clearly dissimilar to Section 2. It provided for flat grants to all parents of \$90.00 per annum per nonpublic school pupil without any correlation to the financial situation of the parent. Before a parent could receive such a grant, he must have "spent an amount equal to or in excess of the per-child grant for the purpose of providing educational opportunities to his child equivalent to those avail-

able to children in the public schools in the district." Thus, a person who spent \$90.00 would get back 100 percent, \$100.00 90 percent, and so on. A person who spent \$85.00 for his child would get nothing. In short, unlike Section 2, the Ohio act contained no mechanism for limiting the aid to one half or less of the tuition actually paid by parents who have a grave financial need. Pennsylvania's "Parent Reimbursement Act for Nonpublic Education"²¹ is presently under review by this Court *sub nom. Sloan v. Lemon and Crouter v. Lemon*, Docket Nos. 72-459, 72-620, *prob. juris. noted* Jan. 22, 1973, 35 L.Ed.2d 268. This statute provides for payments of \$75 and \$150 per annum to parents of elementary and secondary nonpublic school pupils, respectively, or "the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser". [1971] Laws of Pa. No. 92, § 7, Pa. Stat. tit. 24, § 5707. There is obviously no provision in Section 2 similar to this act.

Section 2, it should be emphasized, is carefully limited to meeting a pressing problem of low-income parents (and their children) who would otherwise be denied the freedom of educational choice possessed by more affluent members of our society. It is analogous to numerous other enactments providing food stamps, medical assistance and other services oriented to the needs of families near or below the poverty level.

The District Court Erred in Not Applying the Pertinent Constitutional Tests

The District Court did not apply all of the specific tests summarized by this Court in *Lemon v. Kurtzman* (and in *Tilton v. Richardson*), *supra*, p. 10. See generally 350 F. Supp. at 667-70, 674-76; JSA, pp. 25a-31a, 40a-45a. A

²¹ [1971] Laws of Pa. No. 92, Pa. Stat. tit. 24, §§ 5701-11.

careful reading of the District Court's opinion(s) with respect to Section 2 shows that the court specifically applied only the first of these tests, namely the secular legislative purpose test, and this resulted in an express finding that the purpose of Section 2 is secular, i.e., constitutional. See *supra*, p. 25.

The opinion(s) do not set forth specific conclusions that the principal or primary effect of Section 2 is the advancement of religion or that it fosters an excessive government entanglement with religion. They do not state that implementation of Section 2 would inhibit *Pearl's* free exercise of religion.³² Instead, the District Court focused its decision with respect to Section 2 on the right of appellants Cherry, Ferguson and Ruiz to the free exercise of religion.

The right to the free exercise of religion is unchallenged. The right to educate one's child in conformity with one's religious beliefs is no longer open to challenge. See *Wisconsin v. Yoder, supra*. Cf. *Pierce v. Society of Sisters, supra*. But these right(s) of the appellants are not the basis of a test of the constitutionality of legislation such as Section 2,³³ and appellants Cherry, Ferguson and Ruiz did not argue otherwise in the District Court.³⁴ Nevertheless, the District Court's opinion(s) with respect to Section 2 dwell on the "implications of recognizing a 'right' to the support of public funds for the expression of the free exercise of religion"³⁵ to the disregard of the specific tests controlling the constitutionality of state aid to nonpublic

³² Cf. *Tilton v. Richardson*, 403 U.S. at 678.

³³ Cf. *Brusca v. State of Missouri ex rel. State Board of Education*, 332 F.Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972).

³⁴ See, e.g., Reply Brief for Intervenor-Defendants Boylan, Cherry, Ducey, Ferguson, Ferrarella, Roos and Ruiz, p. 5, Doc. No. 21, Record on Appeal.

³⁵ 350 F.Supp. at 669; JSA, p. 28a.

education set forth by this Court in *Lemon v. Kurtzman* and *Tilton*. Certainly, the question presented herein is not the rhetorical one posed by the District Court in its opinion, to wit, "[i]f State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca."³⁶ Rather, the question is whether partial reimbursement for tuition paid by low-income parents in sending their children to nonpublic schools which provide a "substantially equivalent"³⁷ education meets all of this Court's constitutional tests.

**The Principal or Primary Effect of Section 2
Is Neither to Advance Nor to Inhibit Religion;
Rather It Is to Nurture a Pluralistic Society**

Chief Justice Burger stated in *Tilton* that

[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its *principal* or *primary effect* advances religion. 403 U.S. at 679 (emphasis added).

This Court accepts the fact that secular and religious education in church-related schools are identifiable and separable³⁸ and that such schools perform, in substantial part, a secular function.³⁹ In view of this, we submit that

³⁶ *Id.*

³⁷ *Supra*, note 27.

³⁸ See *Lemon v. Kurtzman*, 403 U.S. at 613. This Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), specifically refused to assume that religiosity necessarily permeates the education provided by the parochial elementary and secondary schools in the State of New York. See *Tilton v. Richardson*, 403 U.S. at 681.

³⁹ See *Board of Education v. Allen*, 392 U.S. at 248.

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a "failure of the state to insure that the funds are restricted to secular education or general welfare services"⁴⁰ is demonstrably unconstitutional only (i) where substantially all of the cost of education (including tuition paid) is reimbursed by the state and (ii) when it is assumed that parents of nonpublic school children would simply pass the state payments on to nonpublic schools. However, under no circumstances can a parent be reimbursed pursuant to Section 2 for more than 50 per cent of the tuition he has already paid, and in most, if not all, cases the percentage of reimbursement will be much less than 50 per cent. Then again, *Pearl* concedes that "the amount of each tuition bill allocable to religion may by itself be small." Brief for Appellants, p. 36. A parent becomes entitled to reimbursement only after he has irrevocably parted with his own money to pay tuition to the school and has submitted proof that that tuition has been paid. Furthermore, the partial reimbursement is payable to him, and *not* to the school, and can be spent by him for whatever purpose he chooses.

If the appropriate test of Section 2's constitutionality is the principal or primary effect test, then the question is whether New York State's partial reimbursement of appellant Ferguson, for example, in the amount of \$100 for the \$700.00 she paid last year to send her daughter to a fully accredited nonpublic high school would have as its *principal* or *primary effect* the advancement of religion.

The lead opinion in *Tilton* states that

[t]he simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld.

⁴⁰ *Lemon v. Sloan*, 340 F.Supp. 1356, 1364 (E.D. Pa. 1972).

Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. 403 U.S. at 679.

In that case, a majority of this Court concluded that the construction of certain buildings on the campuses of four Catholic colleges in Connecticut with the aid of public funds did not have as its principal or primary effect the advancement of religion. Similarly, this Court concluded in *Board of Education v. Allen*, 392 U.S. 236 (1968), that New York's requirement that textbooks be loaned at public expense to pupils attending nonpublic schools is a law, the primary effect of which neither advances nor inhibits religion. See 392 U.S. at 243. See also *Walz v. Tax Comm'n of the City of New York*, 397 U.S. at 672. This Court reached similar conclusions with respect to Sunday closing laws⁴¹ and a New Jersey law entitling parents to reimbursement for the bus transportation of their children to and from parochial schools.⁴² Indeed, even in *Lemon v. Kurtzman*, where this Court concluded that Pennsylvania and Rhode Island statutes relating to the salaries of nonpublic school teachers were constitutionally unacceptable, that conclusion was not based upon any determination that the principal or primary effect of those statutes was the advancement of religion. In sum, statutes providing bus transportation, school lunches, public health services, secu-

⁴¹ See *McGowan v. Maryland*, 366 U.S. 420 (1961).

⁴² See *Everson v. Board of Education*, 330 U.S. 1 (1947).

lar textbooks, even certain buildings, all at public expense, do not offend the Establishment Clause. And the reason that statutes such as these (and Section 2) do not offend the Establishment Clause is that they benefit essentially the parent or child⁴³ and entail no direct relationship between church or church-related institution and state.⁴⁴ This Court stated in *Lemon v. Kurtzman* that “[c]andor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.” 403 U.S. at 612. *See also id.* at 614.⁴⁵ Candor herein requires recognition that individual parents are no less the primary and direct beneficiaries of Section 2 than they were with respect to school bus transportation and textbooks.

As for indirect benefit, there are innumerable laws, both federal and state, which benefit indirectly nonpublic educational institutions in a manner similar to that conferred by Section 2. For example, the *Veterans Readjustment Benefits Act of 1966*⁴⁶ (“G.I. Bill of Rights”) and *National Defense Education Act of 1958*⁴⁷ provide tuition payments (and in the case of the G.I. Bill, textbooks) for student veterans attending schools and colleges of their choice, whether public or private, secular or religious. The *War Orphans’ and Widows’ Educational Assistance Act*⁴⁸ provides for subsistence, tuition, etc. for widows and chil-

⁴³ *Cf. id.* at 16-18; *Board of Education v. Allen*, 392 U.S. at 243-44.

⁴⁴ Section 2’s relationship is strictly one of taxpayer and state. *See infra*, pp. 35-36; BA, p. 26a.

⁴⁵ Chief Justice Burger repeated the same^{*} thought in the lead opinion in *Tilton v. Richardson*. *See* 403 U.S. at 678.

⁴⁶ 38 U.S.C. ch. 34.

⁴⁷ 20 U.S.C. ch. 17.

⁴⁸ 38 U.S.C. § 1700 *et seq.*

dren of persons in the armed forces who die of service-connected disabilities, regardless of whether the tuition is at public or private educational institutions. The *New York State Regents Scholarship Program*⁴⁹ provides 19,500 scholarships annually to apply toward tuition at any public or nonpublic post-secondary school, regardless of religious affiliation, with the amount of the scholarship varying depending on the income of the student's family. The *New York State Scholar Incentive Program*⁵⁰ authorizes grants to students attending any public or nonpublic post-secondary school, regardless of religious affiliation, provided the student meets specified academic standards, with the amount of the grant varying, depending on the income of the student's family. The *Elementary and Secondary Education Act of 1965*⁵¹ provides funds to local educational agencies to meet the special educational needs of children from low-income families; authorizes grants for acquisition of school library resources, textbooks and other instructional materials for the use of children and teachers in both public and private elementary and secondary schools; and authorizes grants for supplementary educational centers and services. The *Legislative Reorganization Act of 1946*⁵² provides that pages in the Senate, House of Representatives and this Court may be educated either in the public schools of the District of Columbia or in "a private or parochial school of their own choice," the cost thereof to be borne by the United States Treasury.

The principal or primary effect of these various statutes is certainly not to advance religion. Rather, it is to nurture a more pluralistic society by meeting the special

⁴⁹ N. Y. Educ. Law § 601.

⁵⁰ N. Y. Educ. Law § 601-a.

⁵¹ 79 Stat. 27.

⁵² 2 U.S.C. § 88a.

needs of certain groups, such as veterans, war-orphans, low-income families, even pages in Congress and this Court, for financial assistance in obtaining an education. We submit that Section 2 has a similar principal or primary effect.

Absence of Entanglement Between Church and State

The third constitutional test set forth in *Lemon v. Kurtzman* and *Tilton* is whether a statute fosters "excessive government entanglement with religion."

This Court has recognized: "No perfect or absolute separation [between religion and government] is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. at 670. "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon v. Kurtzman*, 403 U.S. at 615. But, "[n]o one of these three factors standing alone is necessarily controlling," *Tilton v. Richardson*, 403 U.S. at 688 (Burger, C.J.); it is their combination which is decisive.

In *Walz*, this Court found that tax exemptions for church-owned properties resulted in "... only minimal and remote involvement ... far less than taxation." 397 U.S. at 676. In *Tilton*, this Court found that a federal statute providing construction grants for secular-purpose buildings at religiously-affiliated colleges and universities did not foster excessive entanglement with religion for several reasons, including the absence of any need for "intensive government surveillance." 403 U.S. at 687.

On the other hand, the Rhode Island and Pennsylvania statutes providing for state payment of the salaries of teachers of secular courses in nonpublic schools were invalidated because of the need for extensive probing by the state into the internal affairs of the schools to ensure that the state funds were being used only for secular teaching. This Court stated in *Lemon v. Kurtzman* with respect to the Rhode Island statute:

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church. 403 U.S. at 619.

And with respect to the Pennsylvania statute:

In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state. 403 U.S. at 621-22.

Tested by these criteria,⁵³ there is and can be no involvement in or entanglement with religion on the part of the state under Section 2, let alone an excessive degree thereof. There is no provision in Section 2 which entails either a direct or an indirect relationship between the state and the various nonpublic schools. The statute states that "[i]n order to be eligible for tuition reimbursement . . . the parent of the pupil shall . . . file with the commissioner a verified

⁵³ As stated above at p. 28, the District Court did not specifically apply the entanglement test to Section 2.

statement, in such form as he shall provide . . .” N.Y. Educ. Law § 562.2, BA, p. 11a; JSA, p. 65a (emphasis added). A copy of the prescribed form is appended hereto, page 25a. Furthermore, if any auditing of such statements is deemed necessary by the Commissioner of Education, Section 2 provides that it be carried out by comparing the parent's records on file with the State Tax Commission. *See* N.Y. Educ. Law § 562.4, BA, pp. 11a-12a; JSA, pp. 65a-66a.

In addition, both the legislative and subsequent history of Section 2 belie any potential for political divisiveness along religious lines. Then again, there has been no such undesirable phenomenon with respect to any of the other, older federal and state enactments relating to tuition and other educational assistance cited above, pages 32-33.

SEVERABILITY IS NOT A GENUINE ISSUE HEREIN

Chapter 414 is an omnibus statute, and it contains a specific severability clause, Section 11. *See* BA, p. 24a; JSA, p. 78a. The District Court majority, relying upon this Court's decisions in *Tilton*, 403 U.S. at 683-84, and *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932), held Sections 3-5 of Chapter 414 to be separable from Sections 1 and 2 (and 6-10). Indeed, a review of Chapter 414 not only reveals its omnibus nature, but, more importantly, that each of the substantive parts of the statute stands alone and could have been enacted as a separate law without modification.⁵⁴ Then again, even if the parts of a given statute are not independent of each other, as was true in *Tilton*, "[t]he cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

⁵⁴ Judge Hays's speculation in dissent with respect to the reason for enactment of Sections 3-5 of Chapter 414 [*see* 350 F.Supp. at 676; JSA, pp. 44a-45a] is not supported by the record in this case.

Conclusion

Sections 2 through 5 of Chapter 414 of the 1972 Laws of New York are constitutional in all respects. The District Court's judgment with regard to Sections 3, 4 and 5 should therefore be affirmed, and the judgment with regard to Section 2 should therefore be reversed with a direction to the District Court to dismiss the complaint with respect to Section 2.

Dated: March 22, 1973

Respectfully submitted,

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APPENDIX

Chapter 414 of the 1972 Laws of New York

AN ACT to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12**HEALTH AND SAFETY GRANTS FOR NONPUBLIC
SCHOOL CHILDREN**

Section 549. Legislative findings.

550. Definitions.

551. Apportionment.

552. Applications, reports, regulations.

553. Installments.

EXPLANATION—Matter in *italics* is new; matter in brackets [] is old law to be omitted.

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§ 549. Legislative findings. The legislature hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

2. The state discharges this responsibility to public school children through substantial amounts of per pupil financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five, which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but none the less signif-

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cant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

§ 550. Definitions. In this article:

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d), (c) which is entitled to a tax exemption under section five hundred one(a) and five hundred one(c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).

3. "Base year" shall mean the school year immediately preceding the current year.

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4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.

5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session during such year.

§ 551. Apportionment. 1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiv-

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ing instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

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§ 552. *Applications, reports, regulations. Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.*

§ 553. *Installments. The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July first, nineteen hundred seventy-one such apportionment shall be made in one payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.*

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A, to read as follows:

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ARTICLE 12-A

**ELEMENTARY AND SECONDARY EDUCATION
OPPORTUNITY PROGRAM**

Section 559. Legislative findings.

560. Short title.

561. Definitions.

562. Tuition reimbursement payments to parents.

563. Commissioner; powers.

§ 559. Legislative findings. The legislature hereby finds and declares that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

3. Quality education is made possible for all children in our state only because the burden of providing it has

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been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.

4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.

5. An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition reimbursement for parents of low income, in order to provide partial assistance in meeting the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.

§ 560. Short title. This article shall be known as the "Elementary and Secondary Education Opportunity Program".

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§ 561. *Definitions.* The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000 (d), and (iii) which is entitled to a tax

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exemption under section five hundred one(a) and five hundred one(c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar year exclusive of July and August.

§ 562. Tuition reimbursement payments to parents. 1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular

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school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such

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verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.

§ 563. Commissioner; powers. The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

- 1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.*

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2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subdivision, to be subdivision (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the

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table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragraph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

<i>If New York adjusted gross income is:</i>	<i>The amount allowable for each dependent is:</i>
<i>Less than \$9,000</i>	<i>\$1,000</i>
<i>9,000—10,999</i>	<i>850</i>
<i>11,000—12,999</i>	<i>700</i>
<i>13,000—14,999</i>	<i>550</i>
<i>15,000—16,999</i>	<i>400</i>
<i>17,000—18,999</i>	<i>250</i>
<i>19,000—20,999</i>	<i>150</i>
<i>21,000—22,999</i>	<i>125</i>
<i>23,000—24,999</i>	<i>100</i>
<i>25,000 and over</i>	<i>—0—</i>

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(2) *Husband and wife.* In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

(3) *Definitions.* (A) "Tuition", as used in this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. 2000(d) and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether non-

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public schools come within clause (i) as the state tax commission may require.

(C) "Regular school year", as used in this subsection, shall mean the months of the taxable year exclusive of July and August.

(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.

§ 6. Legislative findings. The legislature hereby finds and declares that:

Since September of nineteen hundred sixty-six when non-public enrollment reached a zenith of 891,000 pupils, the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps intolerable, fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional

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tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

a. Definitions. As used herein:

1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school, during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.

2. borough shall mean any borough of the city school district of the city of New York.

3. aid ratio shall mean the higher of the actual aid ratio established for such district or borough, or thirty-six per centum.

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b. Computation. The amount to be apportioned shall be the product of:

1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and

2. the aid ratio of such school district or borough.

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ratio for each such borough.

d. Any apportionment as herein computed shall be subject to regulations promulgated by the commissioner and shall not be deducted in determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year and the school year next succeeding such year.

§ 8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having been amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively, as follows:

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1. No schoolhouse shall hereafter be erected, *purchased*, repaired, enlarged or remodeled in any school district except in a city school district in a city having seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specifications shall show in detail the ventilation, heating and lighting of such buildings.

In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may prescribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousand dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including

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fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection *or purchase* of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exits upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection *or purchase* of any school building or addition thereto or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of education shall not approve the plans for the erection *or purchase* of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment, accessibility; soil conditions; initial and ultimate cost.

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§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. *The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for an appraisal of such buildings as school buildings and the land on which they are situated as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.*

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two hundred thirty-four of the laws of nineteen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from

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its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, *purchase of existing structures*, for site purchase and improvement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs incidental to such construction or reconstruction, *or purchase of existing structures*.

a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed

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for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction *and the purchase of existing structures* the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven through nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the costs of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction *and the purchase of existing structures* may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

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§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two, and the provisions of paragraph (14) of subsection (c) of section six hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.

IN THE

MAR 26 1973

Supreme Court of the United States

OCTOBER TERM, 1972.

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellants,

vs.

EWALD B. NYQUIST, ETC., ET AL.,

Appellees.

WARREN M. ANDERSON, AS MAJORITY LEADER AND PRESIDENT PRO
TEM OF THE NEW YORK STATE SENATE,

vs.

Appellant,

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellees.

EWALD B. NYQUIST, ETC., ET AL.,

vs.

Appellants,

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellees.

PRISCILLA L. CHERRY, ET AL.,

vs.

Appellants,

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE.**

Brief
Supreme Court, U.S.
FILED

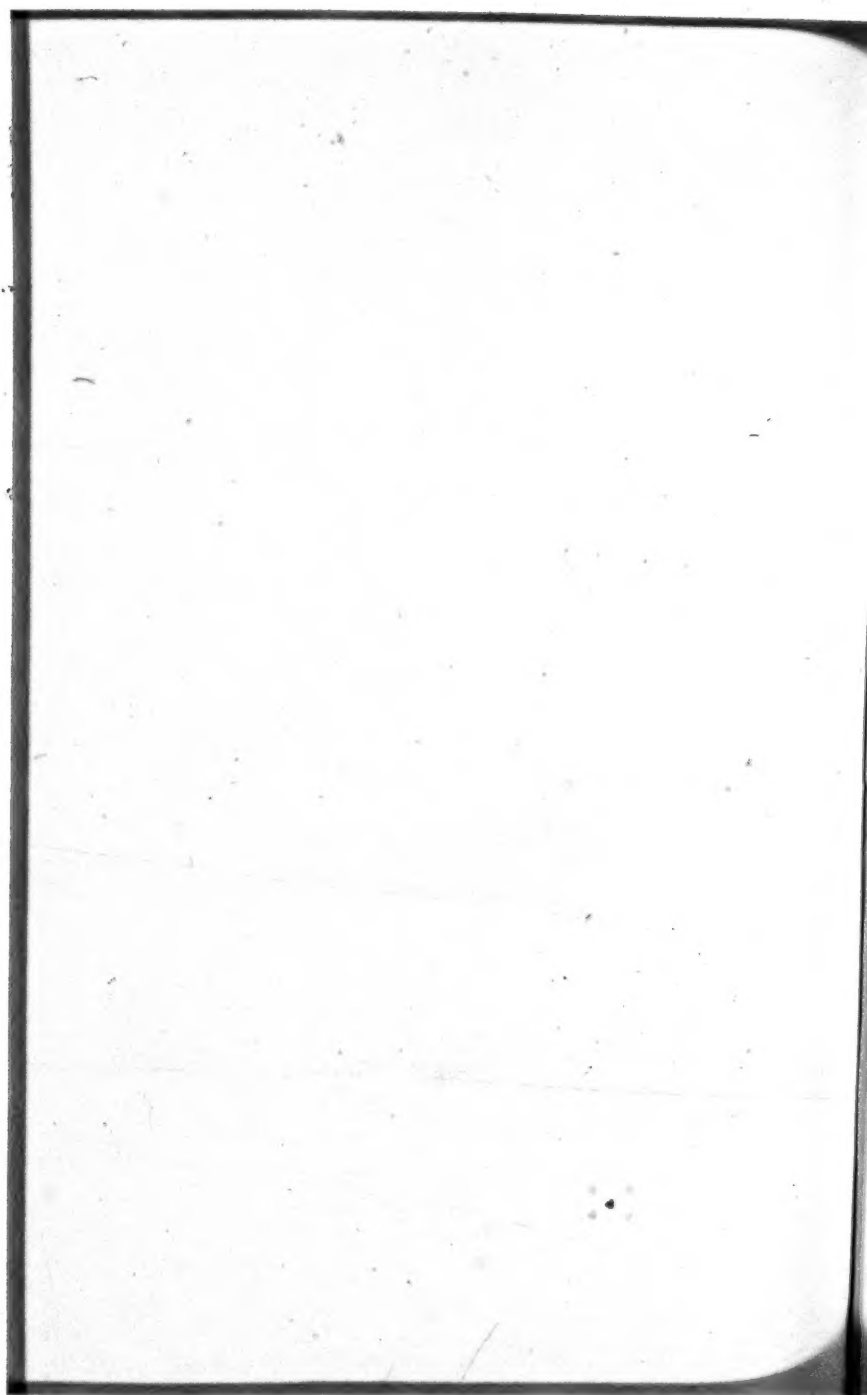
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Chicago, Illinois.

THIS FORM DOES NOT SHOW THE INFORMATION, SEE SECTION II, PAGE 1 OF INSTRUCTIONS.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1972.

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
vs. *Appellants,*

EWALD B. NYQUIST, ETC., ET AL.,
Appellees.

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TEM OF THE NEW YORK STATE SENATE,
vs. *Appellant,*

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
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EWALD B. NYQUIST, ETC., ET AL.,
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Appellees.

PRISCILLA L. CHERRY, ET AL.,
vs. *Appellants,*

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE.**

Now comes Lawrence E. Klinger, by his undersigned
attorneys, and respectfully applies for leave to file a brief
as *amicus curiae* in the above-captioned appeals pursuant
to Rule 42(3), and in support of his application states:

1. The nature of the applicant's interest in this cause is described in his affidavit that is attached hereto and made a part hereof as Exhibit "A".
2. As set forth in the affidavit, Lawrence E. Klinger is petitioner-appellant in the case of *People ex rel. Klinger v. Howlett* now pending on appeal before the Illinois Supreme Court (Illinois Supreme Court Docket No. 45419); the Illinois statute providing assistance to low income families in the *Klinger* case is closely similar to the New York legislation at issue in the instant case.
3. A full evidentiary trial was held in the Circuit Court of Cook County in the *Klinger* case; extensive evidence was adduced to demonstrate, and the trial court specifically found, (a) that a severe emergency now exists in inner-city public schools in Illinois because of the failure of such schools to provide lower income children with a basic education, (b) that nonpublic schools in such areas constitute the only alternative now available to alleviate the crisis and meet the educational needs of lower income children, and (c) that inner-city nonpublic schools could accept many more pupils if more funds were made available now to enable low income parents to enroll their children in such schools. The trial court nonetheless held the Illinois Low Income Families Act unconstitutional, on the ground that it violated the "advancement of religion" criterion of *Lemon v. Kurtzman* and its companion cases, 403 U. S. 602 (1971), and the decision has been appealed to the Illinois Supreme Court.
4. The instant appeals are before this Court on a truncated record consisting almost entirely of pleadings; there was no evidentiary trial below. It is thus believed that the parties will not adequately brief and argue the important First Amendment issues posed by the legislation in question. In light of the evidentiary record and

extensive factual findings of the Illinois trial court in the *Klinger* case, an *amicus* brief on behalf of Klinger in the instant appeals will be of significant aid to the Court in its task of considering and deciding the issues with the benefit of all information, experience and illumination obtainable.

5. Forty printed copies of the proposed *amicus* brief of Lawrence E. Klinger are being lodged with the Clerk contemporaneously with this motion.

Respectfully submitted,

DON H. REUBEN,
LAWRENCE GUNNELS,
JAMES C. MUNSON,
JAMES A. SERRITELLA,
130 East Randolph Drive,
Chicago, Illinois 60601,
312-Randolph 6-2929.
*Attorneys for Lawrence
E. Klinger.*

Of Counsel:

KIRKLAND & ELLIS,
Chicago, Illinois.

March 23, 1973.

EXHIBIT A.

STATE OF ILLINOIS }
 COUNTY OF COOK } ss.

AFFIDAVIT.

LAWRENCE E. KLINGER, being first duly sworn on oath, deposes and says:

1. He is a citizen, taxpayer, voter and real property owner residing in the City of Chicago, County of Cook and State of Illinois. Affiant and his wife, Ellen M. Klinger, are the parents of three school age children. One of said children attends a nonpublic secondary school in the City of Chicago, and two attend a nonpublic elementary school in the City of Chicago. Affiant is also Chairman of the School Board for the Catholic Archdiocese of Chicago which comprises both Cook and Lake Counties, Illinois.

2. Affiant is the Petitioner in a *mandamus* case now pending on appeal before the Illinois Supreme Court (*People ex rel. Klinger v. Howlett*, Ill. Supreme Court Docket No. 45419). Affiant instituted that case to sustain the validity under the United States Constitution of certain Illinois statutes granting financial assistance to children attending nonpublic schools. An evidentiary trial was held in the Circuit Court of Cook County and the case is before the Illinois Supreme Court on a full trial record.

3. One of the Illinois Statutes, entitled the "Nonpublic State Parental Grant Plan for Children of Low Income Families Act" (Ill. Rev. Stat., Ch. 122, §§ 1001-1014) is substantially similar to Section 2 of Chapter 414 of the 1972 New York Laws, entitled the "New York Elementary and Secondary Education Opportunity Program", the

validity of which is being contested in the instant case. In view of this similarity, Affiant is vitally interested in this case and believes that an *amicus* brief will be of significant assistance to the Court in considering and determining the issues presented.

4. Affiant's counsel has requested the written consent of all parties to this litigation to file a brief *amicus curiae*, and such consent was not granted.

/s/ LAWRENCE E. KLINGER,
Lawrence E. Klinger.

Subscribed and sworn to before me this 20th day of March, 1973.

/s/ DOLORES M. FIGIEL,
Notary Public.

APR 2 197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellants,

vs.

EWALD B. NYQUIST, ETC., ET AL.,
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WARREN M. ANDERSON, AS MAJORITY LEADER AND PRESIDENT PRO
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COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
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PRISCILLA L. CHERRY, ET AL.,
Appellants,

vs.

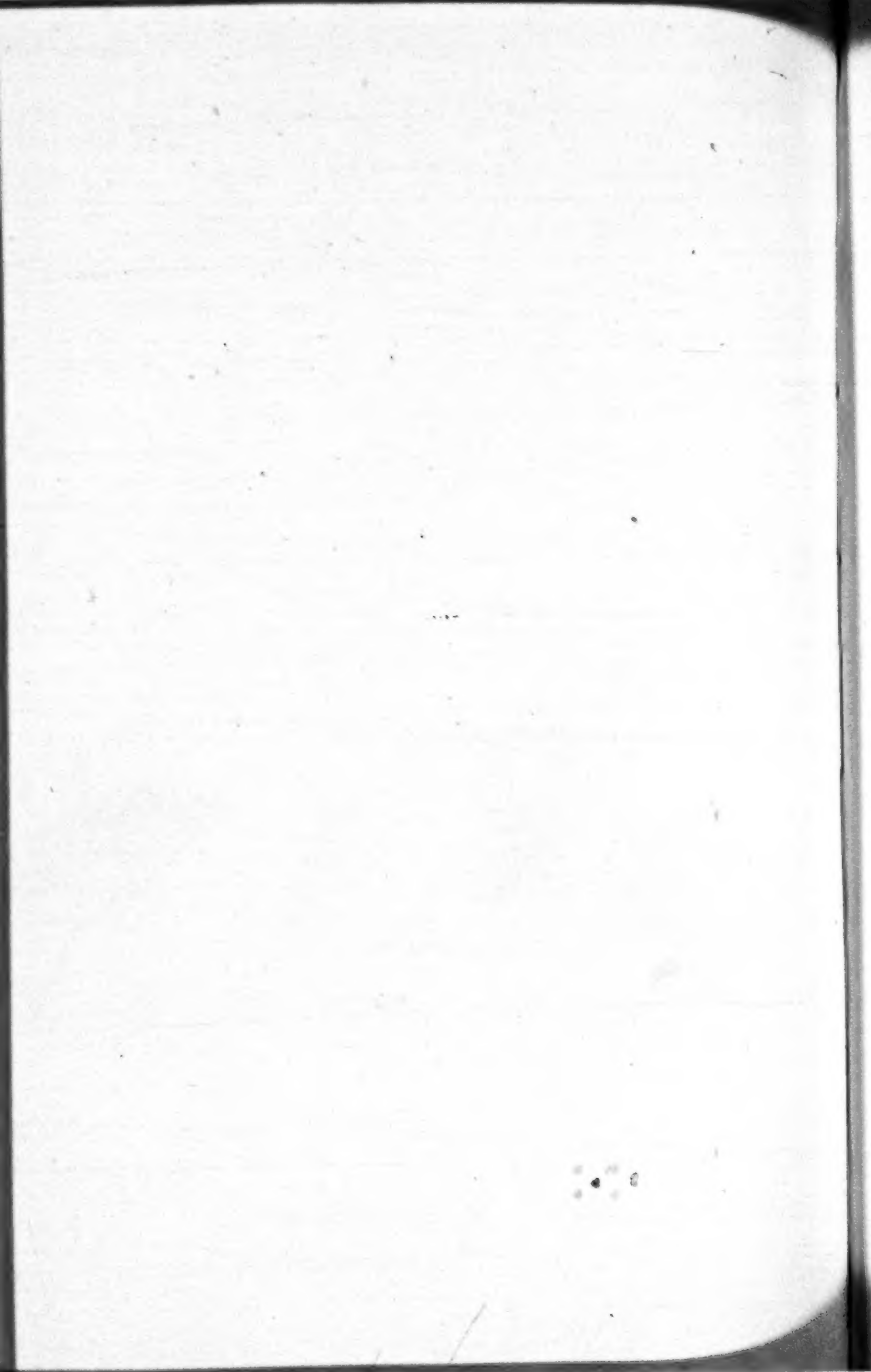
COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR LAWRENCE E. KLINGER
AS AMICUS CURIAE.**

DON H. REUBEN,
LAWRENCE GUNNELS,
JAMES C. MUNSON,
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130 East Randolph Drive,
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Of Counsel:
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Chicago, Illinois.



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Nonpublic State Parental Grant Plan for Children of Low Income Families Act (Ill. Rev. Stat., Ch. 122, §§ 1001-1014)	2, 3, 4, 5, 7, 8
New York Elementary and Secondary Education Op- portunity Program (Laws of New York 1972, Chap- ter 414, Section 2)	2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972.

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellants,

vs.

EWALD B. NYQUIST, ETC., ET AL.,

Appellees.

WARREN M. ANDERSON, AS MAJORITY LEADER AND PRESIDENT PRO
TEM OF THE NEW YORK STATE SENATE,

vs.

Appellant,

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellees.

EWALD B. NYQUIST, ETC., ET AL.,

vs.

Appellants,

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellees.

PRISCILLA L. CHERRY, ET AL.,

vs.

Appellants,

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR LAWRENCE E. KLINGER
AS AMICUS CURIAE.**

MAY IT PLEASE THE COURT:

PRELIMINARY STATEMENT.

The interest of Lawrence E. Klinger as *amicus curiae*
is fully set forth in his affidavit which is attached to his

motion for leave to file this brief. The affidavit is incorporated herein by reference.

In June, 1972, the Illinois Legislature enacted the "Nonpublic State Parental Grant Plan for Children of Low Income Families Act" (hereinafter the "Illinois Low Income Family Act").¹ The Act provides for State payments to enable children from families whose annual income is less than \$3,000 to attend accredited elementary and secondary nonpublic schools. Payments under the Act are made jointly to the child's parents and the nonpublic school to apply to the child's tuition; the grants are limited to the per-pupil amount contributed by the State to the public school district within which the child resides. Thus, the Illinois Low Income Family Act is substantially similar to Section 2 of Chapter 414 of the 1972 New York Laws, i.e., the "New York Elementary and Secondary Education Opportunity Program", now before this Court.²

In July, 1972, immediately after the Illinois Low Income Family Act was signed into law, Lawrence E. Klinger instituted a mandamus proceeding in the Illinois courts to secure a determination of the Act's constitutionality. (*People ex rel. Klinger v. Howlett*, No. 72 L 8703, Circuit Court of Cook County.) A full trial was held in the Circuit Court of Cook County before the Honorable Ben Schwartz, and extensive testimony and documentary evidence was introduced by the parties. Petitioner Klinger introduced the testimony of leading educational experts who have observed and experienced at first-hand the conditions and levels of learning achieved in both the public and nonpublic inner-city or "ghetto" schools of Chicago,

1. The Act is reproduced in full in Appendix "B", *infra*.

2. The New York Elementary and Secondary Education Opportunity Program provides for State tuition grants to reimburse a portion of the costs of educating nonpublic elementary and secondary school children from families whose total annual income is less than \$5,000. Tuition grants are made to the parents and are limited to a maximum of 50% of their tuition costs.

where (as the trial court found) the overwhelming majority of lower income families are concentrated. The foremost expert witness testifying was Dr. Donald Erickson, a Professor in the Department of Education at the University of Chicago.³

On the basis of the evidence thus adduced, the trial court made extensive factual findings with respect to the critical need for the Illinois Low Income Family Act. The findings are contained in the trial court's Memorandum Opinion and Judgment Order, the pertinent portions of which are reproduced in Appendix "A", *infra*.

With regard to the conditions now prevailing in the inner-city public schools, the trial court found that:

"It is thus clear, not only from Dr. Erickson's testimony but from the other evidence in the record, that public schools in the inner-city areas are doing a woefully inadequate job in teaching poor children the most basic literacy skills. The Court makes no findings as to the reasons or causes for this inadequacy and indeed, is not certain that precise reasons could be ascertained through empirical evidence. But the Court does find that the inadequacy exists. In reading levels alone numerous children in inner-city public schools are several years behind their more fortunate counterparts in higher income areas or in private schools. Unless some interim solution or help is provided by way of an alternative to the public schools, these children in the present generation will never catch up and will be educationally lost." (Appendix "A" *infra*, p. A12.)

3. The trial court stated concerning Dr. Erickson's qualifications as an expert:

"It would unduly prolong this opinion to recite Dr. Erickson's qualifications, experience and published writings in the field of education and educational administration, especially in the area of inner-city schools, both public and non-public. It is in fact conceded that Dr. Erickson is one of the nation's leading, if not foremost, experts in his field and has closely observed and studied the public and non-public schools of the City of Chicago for the past ten years." (Appendix "A" *infra*, p. A11.)

With respect to nonpublic schools in inner-city areas, the trial court observed:

"Dr. Erickson further testified, and was substantiated by the testimony of three leading non-public school educators in the 'ghetto' areas of Chicago, that existing non-public schools in such areas constitute the only alternative that is now available for receiving and educating impoverished pupils. Such schools are now succeeding in the critical areas where the public schools have failed, especially in the area of improving and adapting teaching techniques and methodology to fit the unique needs of children from low income families. * * * These witnesses gave graphic and compelling testimony that their schools can and do accept 'drop-out' pupils from the ghetto area public schools and succeed in educating them where the public schools have failed to do so. Indeed, impressive numbers of such children have gone on to college. Unfortunately, such schools are severely hard-pressed financially, and could accept many more pupils if more funds were made available now to enable low income parents to enroll their children in the schools." (Appendix "A" *infra*, p. A13.)

The court then specifically found:

"In sum, the evidence clearly shows and the Court finds that (1) there is a present and grave emergency in the failure of public schools in impoverished or 'ghetto' neighborhoods to meet the basic educational needs of lower income pupils, and (2) existing non-public schools in such areas constitute the only alternative now available to at least partially meet the present crisis and save, at minimum, several thousand impoverished children from being deprived of a basic education." (Appendix "A" *infra*, pp. A13-14.)

The trial court also recognized that the Illinois Low Income Family Act presented a case of first impression, and that "no decided case has come to the Court's attention in which the evidence in the record was similar to the evidence

adduced in the instant case." (Appendix "A" *infra*, p. A10.) Nonetheless, and despite the findings concerning the severe crisis in the failure of inner-city public schools and the undeniable necessity for the Low Income Family Act, the trial judge held the Act invalid under the First Amendment solely because, in his view, it violated the "advancement of religion" criterion of *Lemon v. Kurtzman*, 403 U. S. 602 (1971). Although the trial judge was "most sympathetic to the plight of the children for whose benefit" the Act was intended, and was "persuaded that petitioner's [Klinger's] position is most compelling from the standpoint of reason and common sense," the trial judge believed he had no legal choice but to strike down the Act.

Klinger appealed the decision to the Illinois Supreme Court where the case has been briefed, argued and taken under advisement. (*People ex rel. Klinger v. Howlett*, Docket No. 45419.)

ARGUMENT.

We respectfully submit that the findings of the trial court in *People ex rel. Klinger v. Howlett*, *supra*, based on a full evidentiary trial record, are singularly worthy of the Court's consideration in formulating its decision in the instant case. Of course, neither the record nor the judgment in the *Klinger* case is now before this Court for review; however, the First Amendment issues involved in *Klinger* are closely similar if not identical to those presented by the New York statute in the case at bar, and the Court's decision will in all likelihood have critical influence over the ultimate resolution of the *Klinger* appeal. We believe that consideration of the findings and evidence in the *Klinger* case will aid in identifying and illuminating the "boundaries of permissible government activity in this sensitive area of constitutional adjudication." *Tilton v. Richardson*, 403 U. S. 672, 678.

I.

**THE DISTRICT COURT BELOW AND THE ILLINOIS COURT
IN KLINGER IMPROPERLY TREATED THE CRITERIA
OF THE LEMON CASE AS INFLEXIBLE, MECHANICAL
AND ARBITRARY.**

In *Lemon v. Kurtzman*, 403 U. S. 602 (1971), the Court enunciated the governing First Amendment criteria for testing statutory aid to nonpublic education.⁴ In so doing, however, the Court cautioned that in this unique and sensitive constitutional area, substance must prevail over form and courts are not "to engage in a legalistic minuet in which precise rules and forms must govern". 403 U. S. at 614. And, in the companion case, *Tilton v. Richardson*, 403 U. S. 672 at 678, the Court even more strictly admonished that:

"There are always risks in treating criteria discussed by the Court from time to time as 'tests' in any limiting sense of that term. *Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics.* The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired." (Emphasis added.)

We submit that in both the case at bar and the *Klinger* case, the trial courts did precisely what this Court so painstakingly warned against in *Lemon* and *Tilton*; both courts engaged in a "legalistic minuet" and treated the criteria of *Lemon* as simplistic, inflexible and mechanical tests akin to the laws of natural science.

Indeed, the trial judge in the *Klinger* case expressly viewed the *Lemon* decision as "a simplistic if not arbitrary

4. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally the statute must not foster an 'excessive government entanglement with religion'." (403 U. S. 602, 612-13.)

prohibition of direct state grants of money to aid church-affiliated schools" and as a test that "does not lend itself to . . . a flexible and enlightened approach. . . ." (Appendix "A" *infra*, p. A16.) Moreover, the trial judge candidly acknowledged that he felt helplessly bound in an appalling judicial straitjacket. Although he was "most sympathetic to the plight of the children for whose benefit" the Low Income Family Act was intended, and was also convinced that Klinger's position was "not only persuasive but logically unassailable," the trial judge felt he had no recourse but to void the Act under *Lemon* because "*the line has been drawn.*" (Appendix "A" *infra*, pp. A16, A18; emphasis in original.) He thus concluded:

"The State *may* spend public funds to furnish sectarian school children with school books, school bus transportation, school lunches, health care, counseling, guidance, and innovative educational services, but the State *may not* disburse funds to directly reimburse the parents or the sectarian schools for any portion of the costs of educating the children, because to do so would 'advance religion.' Such a result is not unlike that recently reached in *Flood v. Kuhn*, 32 L. Ed. 2d 278 (1972), where the Supreme Court, in adhering to the rule exempting professional baseball from the federal anti-trust laws, candidly recognized:

'Even though others might regard this as "unrealistic, inconsistent, or illogical," . . . the aberration is an established one. . . .' (32 L. Ed. 2d at 743-744.)

"So here, the 'aberration' is an 'established' one, and the Court regrettably has no choice but to hold that Senate Bill 1489 is invalid under the 'advancement of religion' test of *Lemon*." (Appendix "A" *infra*, p. A18.)

In so holding, the court gave controlling weight to the fact that the majority of nonpublic schools in the inner-

city are Catholic parochial schools.⁵ (Appendix "A" *infra*, p. A14). We submit, however, that the court in *Klinger* (and the District Court in this case) misconstrued the "advancement" criterion of *Lemon* by ignoring that it is only those programs whose "primary effect" is to advance religion that are impermissible. (403 U. S. at 612; emphasis added.) The primary effect of the Illinois Act is clearly and overwhelmingly secular; it is to alleviate the present crisis that exists in the inner-city public schools by enabling low-income children to obtain a basic education in the only schools that are now available to provide it. Moreover, as this Court held in *Tilton*, stereotypes such as the "typical sectarian" school should not be the basis for striking down needed legislation. (403 U. S. at 682.)

In sum, we submit that the simplistic process by which the District Court below and the trial court in the *Klinger* case reached their decisions is antithetical to the spirit and constitutional philosophy of *Lemon* and *Tilton*. When a trial court expressly admits, as the court did in *Klinger*, that a crisis in the education of impoverished children undoubtedly exists and there is only one solution available to alleviate the crisis, the situation clearly cries out for more pragmatic, flexible and enlightened guidelines than those which the trial judge believed had hopelessly handcuffed him. If the criteria of *Lemon* are so stultified and constrictive as to spawn decisions such as those reached in *Klinger* and the case at bar, we submit the Court should now plainly amplify the criteria and render them more flexible for the guidance of the lower courts.

5. The evidence demonstrated that although the majority of nonpublic schools in inner-city areas are Catholic parochial schools, such schools are not primarily or even secondarily religious in their purpose and mission. There are many non-Catholic students in inner-city Catholic schools—in certain areas, 70-80% of the students are non-Catholic. There is no proselytization or indoctrination in such schools, and there is no requirement of religious

CONCLUSION.

We respectfully submit that both the New York and Illinois programs for state aid to low-income children attending nonpublic schools are valid. In the event, however, that the Court decides adversely to the New York program, and in keeping with the Court's admonitions against placing form over substance and treating time-worn stereotypes as living reality, we respectfully submit that the decision should not be cast so as to preclude favorable consideration of the Illinois Low Income Family Act in light of the unique and extensive factual record and findings of the trial court in the *Klinger* case.

Respectfully submitted,

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courses or attendance at religious services to graduate. In the 45 ghetto schools operated by the Catholic Archdiocese of Chicago, the majority of the teachers are lay people, and many of them are not even Catholics. Finally, the evidence showed that the mission of the church-affiliated schools in ghetto areas is not to proselytize, but to teach children to read and write. (Appendix "A" *infra*, p. A14.)

APPENDIX A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS County Department, Law Division

<p>THE PEOPLE OF THE STATE OF ILLINOIS EX REL. LAWRENCE E. KLINGER, <i>Petitioner,</i> vs. MICHAEL J. HOWLETT, Auditor of Public Accounts, State of Illinois, <i>Respondent.</i></p>	}	No. 72 L 8703
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MEMORANDUM OPINION AND JUDGMENT ORDER

At issue in this cause is the constitutionality of three enactments* of the Illinois General Assembly that were signed into law by the Governor on July 1, 1972. The three enactments are:

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2. *Senate Bill 1489*, entitled the "Non-Public State Parental Grant Plan for Children of Low Income Families Act of 1972". This Act provides for state contribution to reimburse a portion of the costs of educating non-public elementary and secondary school children from families whose total income is less than \$3,000 per year. The grants under this Act are limited in amount to the actual per-pupil

* [The trial court held constitutional Illinois Senate Bill 1492, which provides for textbook and auxiliary service grants to parents of children in nonpublic schools and Senate Bill 1499 which provides "seed money" for the development and administration of innovative educational programs. For the sake of brevity those portions of the Opinion have been omitted.]

amount contributed by the State to the public school district in which the non-public school child resides. For the purpose of implementing the Low Income Family Act, the Legislature has appropriated the sum of \$4,500,000. (Senate Bill 1497.)

On June 30, 1972, the State Auditor of Public Accounts, the Honorable Michael J. Howlett, issued a formal directive to his employees commanding that no vouchers be processed or warrants issued to release any state funds in connection with the bills described above, pending final judicial determination of their constitutionality. On July 1, 1972, immediately after the bills were signed into law by the Governor, the petitioner herein, Lawrence E. Klinger, filed a mandamus proceeding in the Supreme Court of Illinois to secure a determination of the bills' validity under both the United States and Illinois Constitutions, and an original writ of mandamus requiring the Auditor of Public Accounts to rescind and withdraw his official directive of June 30, 1972. Mr. Klinger is a citizen, voter, taxpayer and real property owner residing in Chicago. He and his wife have three children attending non-public schools in Chicago.

On July 6, 1972, the Supreme Court of Illinois entered an Order declining to entertain and hear Mr. Klinger's petition as an original matter. The Court's Order stated:

"It appears to the Court, based in part upon our earlier consideration of similar legislation, that the degree of 'entanglement' of church and State involved in the implementation of the questioned statutes can best be assessed on the basis of a record of testimony or other evidence presented initially in an adversary action in a trial court, and thereafter expeditiously reviewed pursuant to the provisions of Rule 302 (b)."

On July 7, 1972, the instant mandamus proceeding was accordingly filed by Mr. Klinger in this Court; the petition seeks an adjudication that the statutes involved are constitutional, and prays for a writ of mandamus ordering the revocation and withdrawal of the respondent Howlett's directive of June 30, 1972. Notwithstanding the Illinois Supreme Court's denial as aforementioned, this Court construes that Court's order as a remandment order for an evidentiary and adversary trial. Such a trial has been held and extensive testimony and documentary evidence has been introduced by the parties on all issues presented. This evidence has been carefully considered by the Court, together with the legal arguments presented by able counsel on both sides.

The three statutes are all assailed under the "religious" clauses of both the First Amendment to the U. S. Constitution and the Illinois Constitution of 1970. The First Amendment concisely forbids any laws "respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Illinois Constitution of 1970 contains two sections pertaining to religion, Article I, Section 3 and Article X, Section 3. The former is a guarantee of "free exercise and enjoyment" of religion and is plainly equivalent by its terms to the "free exercise" clause of the Federal First Amendment. Article X, Section 3 reads:

"Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other

personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose."

This section was readopted verbatim from the preceding Illinois Constitution of 1870, in which it appeared as Section 3 of Article VIII. The record of deliberations of the Constitutional Convention that drafted the 1970 Constitution clearly shows that the framers intended Article X, Section 3 to be coterminous with the religious establishment clause of the Federal First Amendment. (1970 Transcripts of Ill. Const. Convention, Apr. 23, 1970; pp. 3-6; Apr. 28, 1970, p. 50 and pp. 68-75.) Moreover, the prior decisions of the Illinois Supreme Court construing Section 3 have held that it is, if anything, *less* strict than the establishment clause of the First Amendment. In *Dunn v. Chicago Industrial School for Girls*, 280 Ill. 613 (1917), the Court sustained payments made from public funds *directly* to a sectarian (Catholic) school to help defray expenses for the care and education of children placed there by the juvenile authorities. In holding that such payments did not violate Article VIII, Section 3, the Court declared:

"The constitutional prohibition against furnishing aid or preference to any church or sect is to be rigidly enforced, but it is contrary to fact and reason to say that paying less than the actual cost of clothing, medical care and attention, education and training in useful arts and domestic sciences, is aiding the institution where such things are furnished." (280 Ill. at 618.)

To the same effect are *Dunn v. Addison Manual Training School for Boys*, 281 Ill. 352 (1917); *St. Hedwig's Industrial School for Girls v. Cook County*, 289 Ill. 432 (1919). In light of these decisions, and the record of deliberations of the 1970 Illinois Constitutional Convention, the Court

is convinced that if the three statutes or any of them here in question are held not to infringe the First Amendment to the U. S. Constitution, there can be no question as to their validity under the Illinois Constitution of 1970.

In considering the federal constitutional issue, this Court must look to the decision of the Supreme Court of the United States in *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U. S. 602 (1971), hereafter referred to as the *Lemon* decision, and *Tilton v. Richardson*, 403 U. S. 672 (1971). It would be pedantic to review at length earlier cases that dealt with First Amendment limitations on state or federal governmental expenditure of public funds to aid non-public or sectarian schools.

At issue in *Lemon* were statutes of Rhode Island and Pennsylvania that authorized grants of state tax monies to assist non-public schools; the Rhode Island Act authorized the state to pay annual salary supplements to teachers of secular subjects in private schools, and the Pennsylvania plan authorized the state to "purchase" secular educational materials and services from private schools by directly reimbursing them for such materials and services provided to their pupils. Both statutory schemes required extensive and elaborate inspection, record-keeping, accounting and auditing procedures to assure that state funds were used only for secular purposes and not for religious instruction.

The Court in *Lemon* comprehensively reviewed its past holdings concerning the First Amendment "wall" of separation between church and state and noted that total or absolute separation in a modern society is not possible. "Some relationship between government and religious organizations is inevitable," e.g., governmental fire and safety inspections of church buildings and schools, and

requiring compliance with state compulsory attendance laws in church-affiliated private schools. (403 U. S. at 614.) The Court also approvingly noted its prior decisions upholding state aid to non-public school children or their parents in the form of school bus transportation, *Everson v. Board of Education*, 330 U. S. 1 (1947), and secular textbooks, *Board of Education v. Allen*, 392 U. S. 236 (1968). The Court in *Lemon* summarized the kinds of state assistance held permissible as follows:

“Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.” (403 U. S. at 616-17.)

The Court also was careful to point out that the constitutional mandate of separation of church and state is delicate and clouded and cannot be applied mechanically or arbitrarily as new cases arise; the Court thus declared:

“Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

“The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment.” (403 U. S. at 612.)

The Court then proceeded to delineate three criteria evolved in past cases for measuring particular state educational programs under the religious clause of the First Amendment: (1) The program must have a secular purpose; (2) The program must have a primary effect that neither advances nor inhibits religion; and (3) The program must not entail excessive government entanglement

with religion. (403 U. S. at 612-13.) As applied to the Rhode Island and Pennsylvania programs in question, the first two criteria were held satisfied in *Lemon*; both programs were found plainly secular in purpose and did not advance or inhibit religion. In so holding the Court reaffirmed its past pronouncements that operation of private schools by religious organizations or sects *per se* does not preclude all forms of state assistance, *e.g.*, *Board of Education v. Allen*, 392 U. S. at 247-48:

“[P]rivate education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . . [T]he continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.”

As to the third criterion, excessive entanglement, the Court identified three further elements to be examined: (1) the character and purposes of the institutions benefited, (2) the nature of the aid that the state provides, and (3) the resulting relationship between the government and the religious institutions. (403 U. S. at 615.) The Court held that the Rhode Island and Pennsylvania programs failed to pass muster; both of them entailed “excessive entanglement” between church and state *because of the frequent and compulsory inspections, accountings, audits and surveillance necessary to assure that the state funds would not be used for sectarian purposes or teachings.* (403 U. S. at 620.)

With regard to the entanglement criterion, the petitioner

has introduced (in addition to the three statutes themselves) the administrative rules or guidelines that have been prepared by the Office of the Superintendent of Public Instruction for the implementation and administration of Senate Bills 1492 and 1489 (the Books and Services and Low Income Family Acts), and the testimony of the Associate Superintendent for Academic Affairs in the Office of the Superintendent of Public Instruction, Mr. Jack C. Watson, under whose direction and supervision the rules or guidelines were prepared.

The basic procedures established in the State Superintendent's administrative rules or guidelines for implementation of the Low Income Family Act (Senate Bill 1489) are similar to those for the Books and Services Act (Senate Bill 1492) described above. The parents of non-public elementary or secondary school children from families with less than \$3,000 annual income prepare an application for each child for whom aid is requested, giving identifying information as to the child and the school he attends. The application is forwarded to the Superintendent of the public school Educational Service Region in which the non-public school is located. The non-public school submits a certification to the regional Superintendent that the school meets the requirements of the Act, i.e., that the school is a legal entity (lawfully incorporated as provided by law), has for the past two years provided education in compliance with the compulsory school attendance law of Illinois, is in compliance with Title VI of the Federal Civil Rights Act of 1964, is a non-profit institution, and has been duly inspected by the State Fire Marshal as required by law. The non-public school must also forward to the re-

gional Superintendent a certified average daily attendance figure for each child for whom a grant application has been made; such average daily attendance figure is determined in accordance with the method prescribed in Section 18-8 of the Illinois School Code.

The parental applications and non-public school certifications are reviewed by the regional Superintendents and are then certified to the State Superintendent of Public Instruction. The State Superintendent then vouchers payment of the grant to which the parent is entitled based upon the average daily attendance of the child and the actual per-pupil amount contributed by the state to the public school district within which the non-public school child resides. The checks are made payable jointly to the applying parent and the non-public school attended by the child. The contacts or relationships between the non-public schools and the state government in implementation of the Low Income Families Act are thus of the wholly secular kind that are already in existence, *e.g.*, compulsory attendance requirements, fire and safety inspections and the like.

* * * * *

The Court therefore finds that Senate Bills 1489, 1492 and 1499 do not violate the "excessive entanglement" criterion of *Lemon*. The test is inescapably a matter of degree bottomed upon whether the involvement requires continuing official surveillance to determine if the funds are used for sectarian purposes or teaching. The non-public schools have long been subjected to state inspection and control over many secular aspects of their existence. They meet the same requirements of compulsory attendance laws, construction and safety of buildings, fire and safety inspections and other measures applicable to public schools. The in-

stant statutes do not require, either on their face or as proposed to be administered, any detailed administrative relationship for their enforcement. These are not the kind of "programs whose very nature is apt to entangle the state in details of administration." *Lemon, supra* at 616.

Turning to the first and second *Lemon* criteria—whether the program is secular in purpose and has a primary effect that neither advances nor inhibits religion. . . .

.

More difficulty is presented by Senate Bill 1489, the Low Income Family Act, which counsel for petitioner has aptly called the "storm center" of this controversy. This Act constitutes a direct state grant of monetary aid to a very narrowly defined and needy class—those families whose annual income totals less than \$3,000—for the purpose of paying a portion of the cost of sending their children to non-public schools. Because of the class that is involved, the grants may be considered in the nature of public welfare assistance or "ADC". However, unlike welfare or "ADC" payments which may be used for *any* purpose, *including sending children to non-public schools*, the payments under Senate Bill 1489 can be used only for that purpose. In fact, the checks must be made payable jointly to the parents and the non-public schools. To the best of this Court's knowledge, Senate Bill 1489 presents a case of first impression and no reported decision has adjudicated the First Amendment issues that it poses. Moreover, no decided case has come to the Court's attention in which the evidence in the record was similar to the evidence adduced in the instant case. Careful and thoughtful consideration of the evidence introduced with regard to Senate Bill 1489 is warranted.

First it is not disputed, nor can it be, that the members of the class defined by the Low Income Family Act are mainly if not overwhelmingly concentrated in inner-city or "ghetto" areas, and particularly in the "ghetto" areas of Chicago. Accordingly, extensive and impressive evidence has been submitted concerning the conditions and educational shortcomings of the public schools in such areas. The most impressive evidence was the testimony of Dr. Donald Erickson, a professor in the Department of Education at the University of Chicago. It would unduly prolong this opinion to recite Dr. Erickson's qualifications, experience and published writings in the field of education and educational administration, especially in the area of inner-city schools, both public and non-public. It is in fact conceded that Dr. Erickson is one of the nation's leading, if not foremost, experts in his field and has closely observed and studied the public and non-public schools of the City of Chicago for the past ten years.

Dr. Erickson, after describing and summarizing the conditions in the inner-city public schools of Chicago, testified that the present situation concerning the education of children from low income families "is catastrophic." Dr. Erickson testified that the public schools in "ghetto" areas have failed to achieve even minimal levels of teaching impoverished pupils the basic educational skills; this failure is the result of a number of factors, including overcrowding of classrooms, inadequate facilities, high pupil-teacher ratio, hostility among pupils and teachers, and the inability or unwillingness of public school educators to adapt their curriculum and teaching methodology to the special and unique needs of children from low income families. Of these factors, Dr. Erickson placed the greatest stress upon the last one, i.e., the inflexibility in curriculum and teaching

methodology. He emphasized that while the present public school curriculum and teaching techniques are adequate to cope with the learning needs of middle and upper income class children, they are indisputably unsatisfactory insofar as low income children are concerned. As a result Dr. Erickson concluded that, as noted above, the conditions in the public schools in "ghetto" areas have now reached a "catastrophic" state, and that unless some alternative to the public schools is provided at once, "several thousand" impoverished children in such areas will receive no basic education and will thus be deprived of the literacy skills necessary to become useful citizens.

It is thus clear, not only from Dr. Erickson's testimony but from the other evidence in the record, that public schools in the inner-city areas are doing a woefully inadequate job in teaching poor children the most basic literacy skills. The Court makes no findings as to the reasons or causes for this inadequacy and indeed, is not certain that precise reasons could be ascertained through empirical evidence. But the Court does find that the inadequacy exists. In reading levels alone numerous children in inner-city public schools are several years behind their more fortunate counterparts in higher income areas or in private schools. Unless some interim solution or help is provided by way of an alternative to the public schools, these children in the present generation will never catch up and will be educationally lost. Indeed, Dr. Erickson testified that two or three generations of such children may be lost because it could well take from ten to thirty years to carry out the basic reforms and improvements that are necessary in the public schools. The net result in the meantime is that more and more poor children will continue to drop out or fail in the inner-city public schools, and a corresponding

increase will occur in the ranks of welfare and ADC applicants, vagrants and criminals, which will in turn result in an increased tax burden to the general public.

Dr. Erickson further testified, and was substantiated by the testimony of three leading non-public school educators in the "ghetto" areas of Chicago, that existing non-public schools in such areas constitute the only alternative that is now available for receiving and educating impoverished pupils. Such schools are now succeeding in the critical areas where the public schools have failed, especially in the area of improving and adapting teaching techniques and methodology to fit the unique needs of children from low income families. The three non-public school educators who testified were Ann Tyskling, Director of the Harvard-St. George School, Mark Berry, Principal of the CAM Academy, and Sister Ann-Christine Heintz, Principal of St. Mary's Center for Learning. These witnesses gave graphic and compelling testimony that their schools can and do accept "drop-out" pupils from the ghetto area public schools and succeed in educating them where the public schools have failed to do so. Indeed, impressive numbers of such children have gone on to college. Unfortunately, such schools are severely hard-pressed financially, and could accept many more pupils if more funds were made available now to enable low income parents to enroll their children in the schools.

In sum, the evidence clearly shows and the Court finds that (1) there is a present and grave emergency in the failure of public schools in impoverished or "ghetto" neighborhoods to meet the basic educational needs of lower income pupils, and (2) existing non-public schools in such areas constitute the only alternative now available to at least partially meet the present crisis and save, at mini-

mum, several thousand impoverished children from being deprived of a basic education.

Counsel for the respondent actually has not disputed these facts, but contends that no matter how severe the emergency, the Low Income Family Act is unconstitutional because it will "advance religion" within the meaning of the *Lemon* decision, i.e., the state funds authorized by the Act will flow to non-public schools that are predominantly church-affiliated. It is undisputed that the majority of non-public schools in the inner-city areas are Roman Catholic parochial schools. Father Robert Clark, the Superintendent of schools operated by the Catholic School Board of the Archdiocese of Chicago, has testified that while religious courses are taught in such schools, they are not compulsory; the students may elect to be excused from the religion classes if they or their parents so request and no grades are given to the students who do attend them. There are large numbers of non-Catholic children attending parochial schools in the inner-city or "ghetto" areas and in several such schools the majority of pupils are non-Catholic. Father Clark also testified that as a matter of Archdiocesan school policy there is no proselytization in the schools operated under the Catholic School Board's auspices.

However, the fact remains that such schools are sectarian. The Chicago Archdiocesan School Board promulgates a Manual of "School Policies and Administrative Regulations for Elementary Schools" (Respondent's Exhibit 6) which contains a number of instructions and admonitions concerning religious teaching in the parochial schools.* While there are now a great many lay teachers

* For example, § 2200 of the Manual provides that the parish pastor is ex officio the chief administrative officer of the school,

in the parochial schools (including some non-Catholics), there are also many sisters and priests, and §-6142.13 of the Manual provides that each Catholic elementary school "must have a qualified Religious Education Chairman appointed by the principal with the approval of the pastor." Although the religion course is not "compulsory" the one that is taught in the elementary parochial schools is Catholic (§ 6142.1) and "Apostolic experiences and liturgical experiences, in accord with approved liturgical norms should be an integral part of the religious education program." (§ 6142.11).

By taking notice of the religious character of the parochial schools, this Court does not mean in any way to disparage them or to deny their tremendous value and service in effectively educating large numbers of children in the state.* Indeed, the courts in virtually all past cases in this field have recognized and heralded the secular worth of parochial schools. But the Supreme Court in the *Lemon* case has declared:

and that his principal responsibility is to see that an effective program of religious education is maintained in the school. § 4112.4 provides that, "Because the distinctive and unique purpose of the Catholic school is to create a Christian educational community—one enlivened by a faith that is shared among teachers and students—it is expected that teachers employed in the Archdiocesan elementary schools will be Catholics who have a knowledge of and commitment to the Catholic faith and to Christian living." See also §§ 1000, 4113, 5144, 6111.1, 6142.1, 6142.11 and 6142.13.

* Respondent's evidence shows that in 1969-70 there were 425,770 children enrolled in Catholic elementary and secondary schools throughout the State of Illinois. The vast majority (78.6%) were enrolled in parochial schools; the remainder were enrolled in inter-parochial, diocesan and private order Catholic schools. (Respondent's Exhibit 3, "Crisis in Illinois Non-Public Schools," Table D-7.) Father Clark testified that of all the children enrolled in Catholic schools in Chicago, approximately 10% were in inner-city or "ghetto" schools.

"The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn." (403 U. S. at 625.)

Counsel for the petitioner has argued with great force and eloquence that the present undisputed emergency in inner-city schools amply justifies the sustaining of Senate Bill 1489 as an interim and secular measure to prevent countless impoverished children being deprived of a basic education. Clearly, Senate Bill 1489's intended purpose and resulting effect are overwhelmingly secular and will not substantially "advance religion" or lead to political "divisiveness" as the Supreme Court feared would result by upholding the Pennsylvania and Rhode Island programs in the *Lemon* case. (403 U. S. at 622-623.) The Court is most sympathetic to the plight of the children for whose benefit Senate Bill 1489 is intended, and is also persuaded that petitioner's position is most compelling from the standpoint of reason and common sense. But the *Lemon* opinion as written does not lend itself to such a flexible and enlightened approach; it is in this Court's view a simplistic if not arbitrary prohibition of direct state grants of money to aid church-affiliated schools. Certainly this is the interpretation that has been given it by other lower courts. See *Wolman v. Essex*, 342 F. Supp. 399 (S. D. Ohio, Apr. 10, 1972); *Committee for Public Education v. Levitt*, 342

F. Supp. 439 (S. D. N. Y., Apr. 27, 1972); *Lemon v. Sloan*,
 F. Supp. (E. D. Pa., Apr. 6, 1972).

The end result of thus interpreting *Lemon* (and its fore-runner cases such as *Allen* and *Everson*) was accurately characterized by counsel for petitioner as a rule of law that requires the courts to engage in "the rankest of sophistry" in the name of preserving religious freedom. Thus, counsel argued:

"MR. REUBEN: Let's look at the result. Let's look at the result of a simplistic approach. What is being said then is, you can take a ghetto child, you can put him in a bus paid for by the state, you can give him a textbook paid for by the state, you can run him over to the parochial school if you want to use that example, you can give him a hot lunch, you can give him a shot in the arm, you can give him guidance, but you can't look at whether or not he is learning to read or write and help him there.

"THE COURT: Well, are you suggesting then if there is a complete breakdown in the public education system that it will be permissible, constitutionally permissible then for the legislature to appropriate the funds to every private school if their educational system is better than our public school system?

• • • • •
 "MR. REUBEN: I will say this right now, which perhaps is totally responsive to your Honor. I have no doubt if tomorrow morning some fiend set fire and burned down every public school in the city that your Honor and every judge in the building and for that matter every judge in the country, including the Supreme Court—

"THE COURT: I am glad you're showing so much confidence in the judicial system.

"MR. REUBEN: —would find a way to fund every private school in the state or in the city where the tragedy occurred.

"THE COURT: Because of the emergency.

"MR. REUBEN: That is right. Now I suggest to you that the emergency that was portrayed before your Honor, before this Court the last three days is not one that anybody can graphically see by the burned bricks, mortar and wood. It is something that has to be visualized in the mind's eye, unless you go up to confront these people."

The Court believes petitioner's reasoning is not only persuasive but logically unassailable, and that to hold otherwise and hew to the *Lemon* line of demarcation is to engage in "the rankest of sophistry" in the name of preserving freedom of religion. *But the line has been drawn.* The State may spend public funds to furnish sectarian school children with school books, school bus transportation, school lunches, health care, counseling, guidance, and innovative educational services, but the State may not disburse funds to directly reimburse the parents or the sectarian schools for any portion of the costs of educating the children, because to do so would "advance religion." Such a result is not unlike that recently reached in *Flood v. Kuhn*, 32 L. Ed. 2d 278 (1972), where the Supreme Court, in adhering to the rule exempting professional baseball from the federal anti-trust laws, candidly recognized:

"Even though others might regard this as as 'unrealistic, inconsistent, or illogical,' . . . the aberration is an established one . . ." (32 L. Ed. 2d at 743-744.)

So here, the "aberration" is an "established" one, and the Court regrettably has no choice but to hold that Senate Bill 1489 is invalid under the "advancement of religion" test of *Lemon*.

In sum, on the basis of the findings and conclusions herein, the Court hereby holds that Senate Bill 1489 is void for violation of the Religion Clause of the First Amendment to the U. S. Constitution, and that Senate Bills 1492 and 1499 are constitutional and valid. It is accordingly ordered that a People's Writ of Mandamus issue commanding the respondent to rescind and withdraw that portion of his Directive of June 30, 1972 which requires that no vouchers are to be processed or warrants issued by respondent's office relating to expenditure of State funds under Senate Bills 1492 and 1499.

ENTER:

BEN SCHWARTZ

Circuit Judge

Dated: September 13, 1972.

APPENDIX B.

**NONPUBLIC STATE PARENTAL GRANT PLAN FOR
CHILDREN OF LOW INCOME FAMILIES ACT**

P. A. 77-1890, eff. July 1, 1972

[Senate Bill 1489]

Sec.

- 1001. Short title.
- 1002. Legislative finding and declaration of policy.
- 1003. Definitions.
- 1004. Grant as partial payment of expenses—Limitations on income.
- 1005. Application for grant—Form—Information required.
- 1006. Notification of nonpublic schools of application for grant.
- 1007. Amount of grant determined by average daily attendance—Dates for application.
- 1008. Certification of amount of payment of grant—Payment.
- 1009. Proration of monies appropriated.
- 1010. Exclusion of applicants from grant under Nonpublic State Parental Grant Act.
- 1011. Administration of Act—Rules, regulations and procedures.
- 1012. Partial invalidity—Severability.
- 1013. Repealer.
- 1014. Effective date.

AN ACT to promote the education of the children of this State, who attend nonpublic schools and who are mem-

bers of low income families, by providing for State grants to parents to help them pay for their children's education, thereby to serve a public purpose, and to repeal Public Act 77-1657. P. A. 77-1890, eff. July 1, 1972.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

1001. Short title.] § 1. This Act shall be known and may be cited as the "Nonpublic State Parental Grant Plan for Children of Low Income Families Act".

1002. § 2. Legislative finding and declaration of policy. The General Assembly has found and declares that (1) the security and welfare of the State of Illinois require that present and future generations of Illinois youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless Illinois elementary and secondary schools in economically depressed areas of low income population are assisted in their efforts to adequately educate their students; (2) these identifiable economically depressed areas of low income population are beset by severe and continuing social problems, including:

- (a) high and continuing delinquency and crime rates;
 - (b) high and continuing unemployment rates;
 - (c) general economic and business depression;
- and
- (d) widely held attitudes of alienation from, and antipathy for the institutions and values of the State of Illinois and the United States;
- (3) these conditions are of critical importance and concern to the people of the State of Illi-

nois; (4) these conditions are due in large part to the failure of the public elementary and secondary schools in economically depressed areas of low income population to adequately educate Illinois youth and to prepare them to assume economically and socially responsible positions in their communities; (5) this failure of Illinois public schools is the direct result of overcrowded classrooms, outmoded facilities, and understaffed faculties that are a consequence of the inability of low income school districts to raise, by taxes, the additional funds necessary to provide adequate services; (6) children from low income families in this State face burdens and a future which requires the finest educational preparation available; (7) an effective primary and secondary school education is essential to the future well-being of these children and all the persons of this State; (8) to insure that the present generation of school age children, from low income families, receive adequate educations and are not permanently impaired in their economic and social futures, it is mandatory that the inadequacy of education in low income areas be immediately remedied; (9) the governmental duty to support the achievement of public welfare purposes in education may in part be fulfilled from government support of the nonpublic education of children of low income families; (10) nonpublic schools, by providing instruction to children coming from economically depressed areas of our State, make an important contribution to the alleviation of this crisis facing our citizenry; (11) not only do these nonpublic schools contribute directly and significantly in the quality of education that they offer; but (12) with rapidly increasing costs occasioned by the rise in school population, consequent demands, in the endeavor for excellence, upon education generally and the struggle of the State of Illi-

nois, commonly with many other states, to find sources by which to finance education, while also attempting to bear the mounting financial burden of the many other areas of modern state governmental responsibility, nonpublic schools also relieve the State of a significant financial burden which if left unchecked, would result in an intolerable financial and educational burden to the State; (13) government support of economically depressed low income area nonpublic primary and secondary schools will result in a reduction of the public school student population in such areas, and thereby reduce classroom overcrowding, raise the teacher-student ratio, and release funds for the repair and construction of various necessary educational facilities; (14) due to a decline in the birth rate, migration of families from low income population areas, and increased tuition costs of nonpublic schools (occasioned in part by higher teacher salaries) there has been a continuing decline in the enrollment in non-public schools in low income population areas that seriously threatens the continued existence of numerous nonpublic schools in such low income population areas; (15) in the event that a significant proportion of nonpublic schools in low income population areas of the State were forced to close by a continued decline in enrollments, the burden imposed upon the existing public schools in low income areas, resulting from the necessary absorption of former nonpublic school students into the public schools, would require massive expenditures for increased physical facilities and teachers; (16) because of the necessary and unavoidable time required to build new schools and train and hire new teachers, existing public schools in low income population areas would be forced for a period of years to accommodate a great mass of new students, previously enrolled in nonpublic schools; (17) the

consequence of this sudden influx of masses of new students into the public schools, already grossly overburdened, understaffed, and overcrowded, would be a totally chaotic and unacceptable condition in the public schools in low income population areas resulting in those schools being completely unable to perform their vitally important function of educating the students enrolled therein; (18) freedom to choose a nonpublic school, meeting reasonable State standards, for a child's education is a fundamental parental liberty and a basic right; (19) the State has the right and duty, in order to promote the future well-being of all its citizens and particularly those who are economically and socially disadvantaged, to provide State grants to low income parents to help them pay for the education of their children in nonpublic schools; such grants serve a public purpose.

1003. § 3. Definitions. The following terms whenever used or referred to have the following meanings except where the context clearly indicated otherwise:

(a) "nonpublic school" means any non-profit school, which is a legal entity, other than a public school within the State, offering education for grades kindergarten through 12, or any combination of such grades.

1. which, for 2 full school years prior to its participation under this Act, has, for its pupils, provided education that is in compliance with the compulsory school attendance requirements of law, Section 26—1 of "The School Code; and

2. which is in compliance with Title VI of the Civil Rights Act of 1964 (Public Law 88-362);¹

1. 42 U. S. C. A. § 2000d et seq.

(b) "non-profit" as applied to a nonpublic school means that no part of the school's net earnings inure, or may lawfully inure, to the benefit of any private shareholder or individual;

(c) "parent" means a parent, guardian, or person standing in the place of a parent of a child enrolled in a nonpublic school;

(d) "Superintendent" means the Illinois Superintendent of Public Instruction or the successor to his duties as may be provided by law.

1004. Grant as partial payment of expenses—Limitations on income.] § 4. Under this Act, the parent of any child attending a nonpublic school is entitled, as partial payment for the expenses incurred in providing schooling, to a yearly per child State grant. This per child State grant shall be equal to the actual per pupil amount contributed by the State, as provided for in Sections 18—8 to 18—10 of "The School Code", to the public school district within which the particular nonpublic school child resides. State grant payments, provided for in this Act, shall be made semi-annually.

This Act is limited to parents whose family income is less than \$3,000 per year, or whose annual family income is in excess of \$3,000 per year from payments under the program of aid to families with dependent children under the Illinois plan approved under Title IV of the Social Security Act.¹

1005. Application for grant—Form—Information required.] § 5. A parent entitled to a grant or grants from the State pursuant to Section 4 of this Act² may make ap-

1. 42 U. S. C. A. § 601 et seq.

2. Chapter 122, § 1004.

consequence of this sudden influx of masses of new students into the public schools, already grossly overburdened, understaffed, and overcrowded, would be a totally chaotic and unacceptable condition in the public schools in low income population areas resulting in those schools being completely unable to perform their vitally important function of educating the students enrolled therein; (18) freedom to choose a nonpublic school, meeting reasonable State standards, for a child's education is a fundamental parental liberty and a basic right; (19) the State has the right and duty, in order to promote the future well-being of all its citizens and particularly those who are economically and socially disadvantaged, to provide State grants to low income parents to help them pay for the education of their children in nonpublic schools; such grants serve a public purpose.

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2. which is in compliance with Title VI of the Civil Rights Act of 1964 (Public Law 88-352);¹

1. 42 U. S. C. A. § 2000d et seq.

(b) "non-profit" as applied to a nonpublic school means that no part of the school's net earnings inure, or may lawfully inure, to the benefit of any private shareholder or individual;

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1. 42 U. S. C. A. § 601 et seq.

2. Chapter 122, § 1004.

plication therefor on a form which shall be signed and sworn or affirmed to by the applicant, and shall include the following information:

- (a) The name and address of the applicant;
- (b) The name, address, age, and grade level of the child with respect to whom the application is made;
- (c) The relationship of the applicant to the child for whom the application is made;
- (d) The name and address of the nonpublic school in which the child is enrolled;
- (e) A certification that the applicant's family income, for the last taxable year preceding the school year for which a State grant is requested, was either less than \$3,000 or was in excess of \$3,000 from payments under the program of aid to families with dependent children under the Illinois plan approved under Title IV of the Social Security Act.¹ A parent shall make a separate application for each and every one of his or her children who are in attendance at a nonpublic school.

1006. Notification of nonpublic schools of application for grant.] § 6. Parents applying for a State grant for the semi-annual parental grant payment period ending January 15 shall so notify the appropriate nonpublic school or schools before or during the first week of the school year for which a grant is requested. Parents applying for a State grant for the semi-annual parental grant payment period ending on the last day of the regular school year shall so notify the appropriate nonpublic school or schools before or during the week including January 16 of the school year for which a grant is requested. The Superintendent may make provision for late notifications.

1. 42 U. S. C. A., § 601 et seq.

1007. Amount of grant determined by average daily attendance.—Dates for application.] § 7. The actual amount of each semi-annual State parental grant shall be determined by the average daily attendance of each applicant's child, as the Superintendent shall provide. Average daily attendance shall be determined by the method prescribed in Section 18—8 of "The School Code".

Each parent, who has applied for and is entitled to a parental grant, shall, for the payment period ending January 15, forward his or her application form or forms, including the amount of each parental grant, to the Superintendent of the Educational Service Region on or before February 15 of the school year for which payment is requested. Each parent, who has applied for and is entitled to a parental grant, shall, for the payment period ending on the last day of the regular school year, forward his or her application to the Superintendent of the Educational Service Region on or before July 15 of the school year for which payment is requested. The Superintendent may make provision for the acceptance of applications and certified parental grant totals received after February 15 or July 15 respectively.

1008. Certification of amount of payment for grant—Payment.] § 8. Upon receipt of the proper information, the Superintendent of each Educational Service Region shall review the certified documents submitted to him by each parent and shall certify to the Superintendent the total amount of State payment to which each parent is entitled by virtue of the parental applications submitted. The Superintendent of each Educational Service Region shall certify each parent's payment amount no later than March 1, for the semi-annual parental grant payment

period ending January 15, and no later than August 1, for the semi-annual parental grant payment period ending on the last day of the regular school year. The Superintendent may make provision for the acceptance of the Educational Service Region's reports of certified amounts received after March 1 or August 1 respectively. The Superintendent shall voucher those certified amounts for payment to each parent no later than March 15 and August 15 respectively. Each certified amount shall be made payable jointly to the applying parent and the nonpublic school to which the particular parental application pertains.

1009. Proration of monies appropriated.] § 9. In the event that the amount of monies appropriated during any fiscal year are insufficient for the payment of the parental State grants provided for herein, payment shall be made in that proportion that the total amount of such payments bears to the total amount of money available for payment.

1010. Exclusion of applicants from grant under Nonpublic State Parental Grant Act.] § 10. Any parent applying for and receiving a State parental grant under the provisions of this Act shall not be entitled to a parental grant under the "Nonpublic State Parental Grant Act" enacted by the 77th General Assembly.¹

1011. Administration of Act—Rules, regulations and procedures.] § 11. This Act shall be administered by the Superintendent of Public Instruction who shall adopt any and all rules, regulations and procedures deemed necessary to insure compliance with and the implementation of the programs and purposes of this Act.

1012. Partial invalidity—Severability.] § 12. If any section, clause or other portion of this Act shall be held

1. Chapter 122, § 1021 et seq.

invalid, that decision shall not affect the validity of the remaining portions of this Act. It is hereby declared that all such remaining portions of this Act are severable, and that the General Assembly would have enacted such remaining portions if the portions that may be so held to be invalid had not been included in this Act.

1013. Repealer

1014. Effective date.] § 14. This Act becomes effective on July 1, 1972 or upon its becoming a law, whichever is later.

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In the Supreme Court of the United States

No. 72-694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS

LIBERTY, ET AL., APPELLANTS

v.

EWALD B. NYQUIST, AS COMMISSIONER OF EDUCATION OF
THE STATE OF NEW YORK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (JS 1a-46a) ¹ is reported at 350 F. Supp. 655.

JURISDICTION

The judgment of the district court was entered on October 20, 1972 (JS 59a-62a). The notice of appeal was filed on November 3, 1972, and probable jurisdiction was noted on January 22, 1973 (App. 79a-80a). The jurisdiction of this Court rests on 28 U.S.C. 1253.

¹"JS" refers to the appendix to the Jurisdictional Statement in No. 72-694 of appellants Committee for Public Education and Religious Liberty, et al. "App." refers to the Appendix filed in Nos. 72-694, 72-753, 72-791, and 72-929.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Chapter 414 of the 1972 Laws of New York is set forth at JS 47a-58a.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the New York statute providing a State income tax deduction to parents who have paid tuition for sending their children to nonpublic (including religiously-affiliated) schools violates the Establishment Clause of the First Amendment as applied to the States under the Fourteenth Amendment.²

INTEREST OF THE UNITED STATES

The interest of the United States in improving the quality of education, promoting the maximum availability and utilization of educational resources, and encouraging diversity in the educational system is set

² The related cases, Nos. 72-753, 72-791, and 72-929, consolidated with this case, involve two other issues: whether the New York law violates the Establishment Clause by authorizing grants for the repair and maintenance of certain nonpublic schools, and whether it does so by providing reimbursement to low income parents for portions of nonpublic school tuitions. We do not discuss the first issue; the second issue is discussed in our brief *amicus curiae* in *Sloan v. Lemon* and *Crouter v. Lemon*, Nos. 72-459 and 72-620, and this will not be repeated here.

forth in the brief of the United States as *amicus curiae* in *Sloan v. Lemon* and *Crouter v. Lemon*, Nos. 72-459 and 72-620, pp. 2-4, dealing with a closely related question.

The United States has a particular interest in the validity under the Establishment Clause of tax allowances made to parents who pay tuition for their children who attend nonpublic schools. In his State of the Union message to Congress of March 1, 1973, the President stated (Weekly Compilation of Presidential Documents, Vol. 9, No. 9, March 5, 1973, p. 202):

[I]n order to enhance the diversity provided by our mixed educational system of public and private schools, I will propose to the Congress legislation to provide a tax credit for tuition payments made by parents of children who attend non-public elementary and secondary schools.

The 1974 federal budget provides for "proposed legislation that would provide an income tax credit for tuition paid to nonpublic elementary and secondary schools" (The President's Message to the Congress Transmitting the Budget for Fiscal Year 1974, Weekly Compilation of Presidential Documents, Vol. 9, No. 5, Feb. 5, 1973, p. 95); see, also, *id.*, Vol. 8, No. 46, November 13, 1972, p. 1631 (President's statement in Chicago, Illinois, on November 3, 1972, stating his support for "legislation that will allow the parents of children attending nonpublic schools tax credits to offset a part of their tuition costs," which he described as a "much needed measure to maintain diversity and to keep a strong spiritual and moral element in the American education system").

STATEMENT

This is a suit to enjoin enforcement of Chapter 414 of the 1972 Laws of New York on the grounds that the Act violates the Establishment and Free Exercise Clauses of the First Amendment (App. 7a-15a). The plaintiffs are the Committee for Public Education and Religious Liberty ("PEARL") and individual citizens and taxpayers of New York (some of whom are parents of children attending New York public schools) (App. 8a-9a). The defendants are the Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance of the State of New York, all of whom are sued in their official capacity (App. 10a), the Majority Leader and President pro tem of the New York State Senate (App. 73a), and individual residents of New York who are parents of students in nonpublic schools (App. 26a-39a).

THE STATUTE

The New York statute at issue, which was approved May 22, 1972, provides, in Sections 4 and 5, for assistance to parents who pay tuition to send their children to nonpublic schools, by providing for such parents an allowance to reduce their adjusted gross income for New York State income tax purposes.³

³ Section 1 of the Act authorizes grants for maintenance and repair to nonpublic schools serving a high concentration of pupils from low-income families, for the purpose of insuring a healthy and safe environment for children attending those schools (JS 47a-50a). Section 2 provides for reimbursement to parents with taxable incomes under \$5,000 of a portion of the tuition paid to send a child to a nonpublic school. Sections 6

Section 3 of the statute contains legislative findings that nonpublic educational institutions "not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children," that such institutions are themselves tax exempt, and that income tax laws already provide for the deduction of amounts contributed to such institutions or for education related to employment. Accordingly, "similar modifications of federal adjusted gross income [for use in calculating the State income tax] should also be provided to parents for tuition paid to nonpublic elementary and secondary schools * * *" (JS 53a).⁴

and 7 provide for an additional payment to a public school district which experiences an increase in enrollment due to the closing of a nonpublic school (JS 55a). Sections 8, 9 and 10 authorize the purchase by a public school district of existing school buildings (JS 56a-58a).

Some findings in Section 2 are equally applicable to the tax deduction provisions of Sections 4 and 5. They state that "[t]he vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children"; and that "[a] healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences." Furthermore, "[q]uality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education [and] [a]ny precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs * * * [which] would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education" (JS 50a).

Sections 4 and 5 of Chapter 414 offer tax relief for the parents of students attending nonpublic schools. Under those sections, parents who have paid at least \$50 in nonpublic school tuition for their children are entitled to a reduction of the federal adjusted gross income figure which is used in computing their New York State income tax (JS 53a-54a). The deduction is allowed for each of the first three children attending nonpublic schools in accordance with a table which reduces the allowance as the parents' income increases.⁵ (*Ibid.*) Thus, while the deduction is \$1,000 for each child (up to three) where the adjusted gross income is less than \$9,000, those with incomes in excess of \$25,000 receive no deduction (*ibid.*). The estimated net benefits range from \$50 per child for

⁵ The nonpublic school attended must be providing instruction in accordance with the State's compulsory education laws; not be in violation of Title VI of the Civil Rights Act of 1964 (which prohibits discrimination because of race, color, or national origin); and be entitled to a federal tax exemption under 26 U.S.C. 501(a), (c) (3).

⁶ The table is as follows (JS 54a):

If adjusted gross income is—	Income exclusion per pupil is—	Estimated net benefit to family		
		1 child	2 children	3 or more
Less than \$9,000.....	\$1,000	\$50.00	\$100.00	\$150.00
\$9,000 to \$10,999.....	850	42.50	85.00	127.50
\$11,000 to \$12,999.....	700	42.00	84.00	126.00
\$13,000 to \$14,999.....	550	38.50	77.00	115.50
\$15,000 to \$16,999.....	400	32.00	64.00	96.00
\$17,000 to \$18,999.....	250	22.50	45.00	67.50
\$19,000 to \$20,999.....	150	15.00	30.00	45.00
\$21,000 to \$22,999.....	125	13.75	27.50	41.25
\$23,000 to \$24,999.....	100	12.00	24.00	36.00
\$25,000 and over.....	0	0	0	0

families with income under \$9,000 to \$12 per child for families with incomes between \$23,000 and \$24,999 (JS 36a).

THE DISTRICT COURT DECISION

The three-judge district court held that Sections 1 and 2 of the Act, providing for grants for maintenance and repair of certain nonpublic schools and for tuition reimbursement to low-income families, violated the Establishment Clause, but ruled, with one judge dissenting, that the tax deduction provisions of Sections 4 and 5 were constitutional.

The court summarized the reasons which made the tax deduction system consistent with the Establishment Clause:

It covers attendance at *all* nonprofit private schools *in the State*. Second, it does not involve a subsidy or grant of money *from the State Treasury* * * *. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools * * *. Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the on-going political activity as likely, in our opinion, to cause division on strictly religious lines [JS 32a-33a] [emphasis in original].

ARGUMENT

THE NEW YORK STATUTE ALLOWING A TAX DEDUCTION TO PARENTS OF NONPUBLIC SCHOOL CHILDREN SATISFIES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BECAUSE ITS PURPOSES AND EFFECT ARE PRIMARILY SECULAR, IT PROVIDES NO DIRECT BENEFIT OR PAYMENT TO RELIGIOUS INSTITUTIONS, AND IT DOES NOT INVOLVE EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

INTRODUCTION AND SUMMARY

The Establishment Clause was primarily intended to guard against the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668. The Court summarized in *Lemon v. Kurtzman*, 403 U.S. 602, the "cumulative criteria developed by the Court over many years" for determining whether a statute satisfies the Establishment Clause (pp. 612-613):

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra* at 674.¹

¹ Appellants assert that this Court has applied tests other than those summarized in *Kurtzman* for determining whether a statute satisfies the Establishment Clause. Thus, they state that *Everson v. Board of Education*, 330 U.S. 1, announced the principle that a government may not subsidize or finance sectarian instruction (Br., p. 9). However, the plurality opinion of the Chief Justice in *Tilton v. Richardson*, 403 U.S. 672, 680, rejected this argument and recognized that the purpose and

The district court correctly recognized that the purposes of the tax deduction sections of Chapter 414 of the 1972 Laws of New York were secular, since they were based on the equitable consideration of providing tax relief to those citizens who help support two school systems. Moreover, they also tend to promote valid state interests in pluralism in education, and in avoiding the fiscal crisis which would be caused by the entry into the public schools of substantial numbers of those now attending nonpublic schools.

Walz v. Tax Commission, 397 U.S. 664, indicates that the tax deduction does not have the primary effect of advancing religion. In *Walz*, a tax exemption granted directly to religious institutions provided them with a permissible "indirect economic benefit" (397 U.S. at 674), since tax relief is not sponsorship of religion. Here, where the tax deduction is given to the parents of children in any qualifying nonpublic school, it is still less a sponsorship of religion, and accordingly any economic benefit to religion is corre-

effect test is controlling. See also *Lemon v. Kurtzman*, No. 71-1470, decided April 2, 1973 (slip op., p. 14, n. 7); *Walz v. Tax Commission*, *supra*, 397 U.S. at 670.

Similarly, *Walz* did not establish a "test of time and place" (Br., p. 20). There the Court stated (397 U.S. at 678) that if a practice has been established for two hundred years, it will take a strong case to make it unconstitutional, but the Court also recognized that a long use does not create a vested right in violation of the Constitution. The decision does not suggest that the fact that a government program that affects religion has been recently adopted makes it constitutionally suspect.

spondingly more indirect and less the "primary effect" of the statute. Furthermore, this Court has stated that where the primary effect of the statute is to benefit the parents, the fact that religiously-affiliated schools may also experience an indirect benefit, through the enrollment of children who would otherwise be unable to attend, is not sufficient to invalidate the statute under the Establishment Clause. *Everson v. Board of Education*, 330 U.S. 1; *Board of Education v. Allen*, 392 U.S. 236. Rather, by alleviating an economic obstacle to the free choice between a religiously-affiliated school and a public school, the statute exhibits that "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, *supra*, 397 U.S. at 669.

Finally, the tax deduction provisions here involve no excessive government entanglement with religion. The only relation between the State and nonpublic schools required by the Act is that necessary for the State to assure that the schools meet State educational requirements and comply with the non-discrimination provisions of the Civil Rights Act of 1964. Enforcement of such requirements has long been recognized as constitutionally permissible. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534.

Accordingly, Sections 4 and 5 of the Act meet the criteria developed by this Court and thus are consistent with the Establishment Clause of the First Amendment.

A. THE TAX DEDUCTION PROVISIONS OF THE ACT HAVE A SECULAR PURPOSE

The Act contains findings expressing the legislature's belief in the importance of a pluralistic society and the vital need for nonpublic schools to provide a competitive and diverse alternative to public schools in order to nurture such a society (JS 50a). In addition, there are findings that reflect the concern of the legislature that a precipitous decline in nonpublic school enrollment and a corresponding increase in public school enrollment "would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education" (*ibid.*).⁸

The district court correctly recognized that the statutory findings reflect legislative purposes which are "secular in intent" (JS 8a). Cf. *Lemon v. Kurtzman*, *supra*, 403 U.S. at 613. Further, with respect specifically to the tax deduction provisions, the court ruled that they have "a particular secular intent—one of equity—" to give tax relief from the double economic burden placed on citizens who share the expense of maintaining the public schools and who, because of religious belief or otherwise, send their children to a nonpublic school (JS 32-33a). As in *Kurtzman* and *Allen*, there is "nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference." *Lemon v. Kurtzman*, *supra*,

⁸ Although these findings are contained in Section 2, they are equally applicable to the tax deduction provisions. See note 4, *supra*.

403 U.S. at 613; see *Board of Education v. Allen*, *supra*, 392 U.S. at 243.

B. THE PRIMARY EFFECT OF THE TAX DEDUCTION PROVISIONS OF THE ACT NEITHER ADVANCES NOR INHIBITS RELIGION

To satisfy the Establishment Clause, a statute must not only have a secular purpose; its principal or primary effect cannot be to advance or inhibit religion. The argument that Sections 4 and 5 of the Act have that effect rests upon two propositions: (1) that the tax relief the statute provides constitutes the type of assistance which involves financial support or sponsorship of religion; and (2) that grant of such relief to parents of nonpublic school children, rather than directly to the schools, has the primary effect of advancing religion. Neither proposition is sound.

1. In *Walz v. Tax Commission*, *supra*, the Court upheld, as consistent with the Establishment Clause, property tax exemptions to religious organizations for religious properties used solely for religious worship since such exemptions did not have the primary effect of advancing religion. Although recognizing that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit" (397 U.S. at 674), the Court stated (397 U.S. at 675):

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries,

or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.

The tax deductions under the New York statute similarly do not constitute government sponsorship or support of religion. Like the exemption involved in *Walz*, the tax deduction involves no grant of funds by the State, but merely the State's abstention from requiring the payment of certain portions of income taxes which would otherwise be due to it. Indeed, the benefit that religiously-affiliated schools obtain from the tuition tax deductions given to parents of children who attend such schools (see *infra*, pp. 14-15) is more remote than the direct benefit the churches received from the tax exemption upheld in *Walz*.

The nexus between the tax relief involved here and government sponsorship of religion is less than in *Walz*. Here there is only a reduction—and that on a graduated basis—rather than a total forgiveness of taxes, and the recipients of this benefit are the parents of children in any qualifying nonpublic school, religiously-affiliated or secular, and not the religious institution itself.

Thus, *Walz* makes clear that tax relief of the sort involved in Sections 4 and 5 does not constitute financial support or sponsorship of religion.⁹

⁹ While the tax deductions features of the Act do not have the same lengthy history as the property tax exemptions upheld in *Walz*, analogous provisions of the federal income tax, which exempt the income of religious organizations and which permit deductions for contributions to religious organizations, have

2. The primary effect of Sections 4 and 5 of the Act is to provide relief for parents from the financial burdens of supporting not only the public schools, but also a nonpublic school system. It is significant that the aid goes to the parent and not to the school. *Lemon v. Kurtzman, supra*, 403 U.S. at 621.

While religiously-affiliated schools may receive some indirect benefit from the tax relief provided parents due to the attendance of children whose parents might otherwise be unable to afford private education for them, that fact does not render the Act inconsistent with the First Amendment. In *Everson v. Board of Education, supra*, 330 U.S. 1, this Court upheld, as consistent with the Establishment Clause, the reimbursement to parents of money expended for school bus transportation to parochial schools, even though it noted (330 U.S. at 17):

It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State.

been an accepted part of our tax system for many years. *Walz v. Tax Commission, supra*, 397 U.S. at 678. In *Walz*, the Court noted that since 1894 religious organizations have been expressly exempt from federal income tax (397 U.S. at 676). In addition, the district court pointed out that since 1917 Congress has permitted the deduction of contributions to religious organizations, the purpose of which "is no doubt to encourage such contributions" (JS 35a).

Similarly, in *Board of Education v. Allen*, *supra*, 392 U.S. 236, the Court, in sustaining the constitutionality of the loan of textbooks to children attending religiously-affiliated schools stated (392 U.S. at 244):

Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.¹⁰

In *Tilton v. Richardson*, *supra*, 403 U.S. at 679, the plurality opinion of Chief Justice Burger stated that "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." The decisions of this Court show that the primary effect of Sections 4 and 5 is not the advancement of religion.

3. The task of the Court in accommodating "the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause" is "to define the boundaries of the neutral area between these two provisions within which the legislature may legitimately act." *Tilton v. Richardson*, 403 U.S.

¹⁰ Cf. *Zorach v. Clauson*, 343 U.S. 306, permitting the release of children from public school to attend programs of religious instruction.

The difference between direct benefits to religiously-affiliated schools and indirect benefits to parents of children attending such schools is more fully discussed in our brief *amicus curiae* in *Sloan v. Lemon* and *Crouter v. Lemon*, Nos. 72-459 and 72-620, at pp. 13-20.

672, 677 (opinion of Chief Justice Burger). In *Walz v. Tax Commission, supra*, 397 U.S. at 669, the Court stated:

The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Sections 4 and 5 reflect the appropriate and required governmental neutrality toward religion which furthers the interests underlying the Free Exercise Clause. The religious freedom of a parent who, because of economic considerations, cannot send his child to a religiously-affiliated school of his choice, is to that extent inhibited. By alleviating the economic obstacle inhibiting the free choice between a religiously-affiliated and a public school, the tax deductions advance the free exercise of religion.

Although the Act aids the free exercise of religion, it does not encourage parents to send their children to religiously-affiliated schools, since an education in a religiously-affiliated school will almost always cost more than secular education. In addition, since the same tax benefit is available to parents of children in all qualified nonpublic schools, sectarian or secular, no sect is preferred, nor is religion preferred over non-religion. The State is simply not involved in the parental decisions

upon which the allocations of pupils among various non-public schools are made." Therefore, while the tax deductions enhance the ability of a parent to exercise his choice of which school his child will attend, they are completely neutral, since they neither "favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion." *Walz v. Tax Commission, supra*, 397 U.S. at 694 (opinion of Mr. Justice Harlan).

C. THE TAX DEDUCTION PROVISIONS OF THE ACT DO NOT INVOLVE EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

In order for a statute to satisfy the Establishment Clause, it must not involve "an excessive government entanglement with religion". *Walz v. Tax Commission, supra*, 397 U.S. at 674. The tax deduction sections of the Act involve no such entanglement.

Sections 4 and 5 create no administrative relationship between government and religion. They impose no obligation on the nonpublic schools and require no action on the schools' part. While only parents of students attending those nonpublic schools which meet State educational requirements and do not discriminate qualify for tax benefits, Sections 4 and 5 involve no additional State entanglement beyond that require-

¹¹ For this reason, regardless of the accuracy of the figures cited in the brief *amicus curiae* filed by the National Education Association and the Horace Mann League (Brief, n. 7, pp. 14-15), the statute is religiously neutral, since the allocation of pupils among schools depends entirely on parental choice.

ment to determine whether nonpublic schools meet compulsory education standards. These requirements have long been recognized as consistent with the Establishment Clause. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534; cf. *Walz v. Tax Commission*, *supra*, 397 U.S. 664.

While excessive entanglement may also result from the divisive political potential of a state program, the tax deduction provisions have no such potential. This program is self-executing and requires no further action on the part of the legislature. In *Walz*, the Court concluded that the grant of tax exemption to churches did not result in excessive government entanglement with religion. It follows *a fortiori* that the grant of tax relief to parents of nonpublic school students do not create an unconstitutional entanglement.

CONCLUSION

For the foregoing reasons, the judgment of the court as to Sections 4 and 5 of Chapter 414 of the 1972 Laws of New York should be affirmed.

Respectfully submitted.

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APRIL 1973.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-694, 72-758, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*, Appellants,

v.

EWALD B. NYQUIST, *ETC.*, *et al.*, Appellees,

SENATOR WARREN M. ANDERSON, *ETC.*, Appellant,

v.

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LIBERTY, *et al.*, Appellees,

EWALD B. NYQUIST, *ETC.*, *et al.*, Appellants,

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COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*, Appellees,

PRISCILLA L. CHERRY, *et al.*, Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*, Appellees,

On Appeal from the United States District Court for the
Southern District of New York

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS
CURIAE FOR THE NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS**

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Supreme Court,
FILE

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**MOTION FOR LEAVE TO FILE BRIEF FOR THE
NATIONAL JEWISH COMMISSION ON
LAW AND PUBLIC AFFAIRS**

The National Jewish Commission on Law and Public Affairs hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief

amicus curiae out-of-time. As is indicated by letters on file with the Clerk, the movant has obtained the consent of the parties to this case for the filing of such a brief.

The National Jewish Commission on Law and Public Affairs has participated amicus curiae, usually with the consent of the parties, in most of the cases affecting the Religion Clauses of the First Amendment over the past several Terms. See, e.g., *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Levitt v. PEARL*, No. 72-269, O.T. 1972. Because of the expedited briefing schedule in the present cases and as a result of the absence from the United States of counsel who had been principally involved in preparing the briefs for the movant in the cases heard in prior Terms, permission for the filing of the attached brief was not sought in time to have it submitted as required by Rule 42. Nor, for these reasons, was the brief drafted in time to be filed on or before the date for the filing by the parties.

The position taken by the National Jewish Commission on Law and Public Affairs with regard to the constitutional issues in this case differs from that of the parties. From counsel's examination of the briefs filed to date, it appears that none presents the point of view stated in the attached brief.

There is, of course, precedent for the filing of amicus briefs out-of-time in cases involving constitutional issues of such magnitude. See, e.g., brief of the Center for Law and Education, Harvard University, in *Lemon*

v. *Kurtzman*, 403 U.S. 602 (1971). Particularly, when, as is true here, the briefing and argument schedule proceeded on an expedited basis, leave to file should be granted.

For the foregoing reasons the National Jewish Commission on Law and Public Affairs respectfully requests that leave be granted to file the attached brief *amicus curiae* out-of-time.

Respectfully submitted,

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v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*, Appellees,

EWALD B. NYQUIST, ETC., *et al.*, Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*, Appellees,

PRISCILLA L. CHERRY, *et al.*, Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY, *et al.*, Appellees,

On Appeal from the United States District Court for the
Southern District of New York

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON
LAW AND PUBLIC AFFAIRS

INTEREST OF THE AMICUS CURIAE

The National Jewish Commission on Law and Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrim-

ination and to represent the position of the Orthodox Jewish community on matters of public concern. The Commission is deeply committed to the preservation of constitutional rights for all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty. Recognizing the importance of a healthy educational system to the welfare of a free society, the Commission firmly supports the advancement of educational opportunity for all American school children. We believe that our pluralistic society benefits through programs that promote the betterment of the education of all children.

The present case is of critical importance to the *amicus* because it affects the ability of Jewish parents meaningfully to exercise their constitutional right to educate their children at a *yeshiva* (Jewish parochial school), where intensive religious education is provided together with a full program meeting the State's secular educational requirements. Since the cost of education is substantial and is constantly rising under inflationary pressures, tuition at such schools has imposed a heavy burden on families of low and moderate income which they can ill afford to bear. Such financial burden has compelled some parents to forego a *yeshiva* education for their children. Others have shouldered this substantial expense together with the full taxpayer's burden of educating their neighbors' children at local public schools through state and local taxes. We believe that the New York legislature acted in accordance with established principles of fairness, equity and justice in granting a small measure of tax relief to parents of low and moderate income who

choose private education and thereby effectuate considerable savings to the taxpayers of the States.

QUESTION PRESENTED

Is a State barred by the First and Fourteenth Amendment from granting tuition assistance and tax relief to parents who relieve the State of substantial expenditures by sending their children to a private school at their own expense?¹

ARGUMENT

I

A LAW WHICH GRANTS TAX RELIEF OR TUITION ASSISTANCE TO A NONPUBLIC SCHOOL PARENT—AS OPPOSED TO THE NONPUBLIC SCHOOL ITSELF—DOES NOT PRESENT THE DANGERS THAT THE FIRST AMENDMENT WAS DESIGNED TO PREVENT

The New York and Pennsylvania laws now before the Court differ in several respects from those which this Court found invalid in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The most obvious difference—which both district courts discounted out-of-hand—is that the present laws confer financial benefits on the parents of nonpublic school children whereas the earlier statutes prescribed payments that were to be made directly to the schools. From the *Lemon* opinion itself, one might have supposed that this distinction could not be as readily ignored as the courts below believed, for

¹ Although we do not discuss the issue separately in this brief, we believe that Section 1 of the New York law, authorizing direct grants to schools for maintenance and repair of nonpublic school facilities which serve pupils from low-income families, should be sustained as a general welfare measure. Our reasons are substantially similar to those we outlined in our brief for two of the parties in *Levitt v. PEARL*, pending in this Court, Nos. 72-269, 72-270, and 72-271, and in the present brief at pp. 12-16, *infra*.

the Chief Justice distinctly noted, contrasting *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968), that the Pennsylvania statute challenged in *Lemon* provided financial aid directly to the schools (403 U.S. at 621):

This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school.

The New York law challenged here provides two forms of aid to parents—tuition assistance in annual amounts of \$50 or \$100 per child for those at the very bottom of the income scale (with taxable income of less than \$5,000 per year) and a form of tax relief (mistakenly characterized as a “tax credit” by the plaintiffs and the district court) on a progressive scale for parents of nonpublic school children whose annual taxable income is \$25,000 or less. The Pennsylvania statute prescribes uniform tuition assistance of \$75 per child to all parents of nonpublic elementary school children and \$150 to parents of nonpublic secondary school children. Both lower courts assumed erroneously that by giving money to a parent who has paid—or will pay—tuition to a nonpublic school, the State is using the parent as a “conduit” for funds to the school, so that the payment is indistinguishable from a direct transfer to the school from the public treasury. The plaintiffs also maintain that a reduced tax bill for those who send their children to nonpublic schools is indistinguishable from a cash payment to them—a position rejected by a majority of the federal district courts in New York but accepted by a three-judge dis-

trict court in Ohio. *Kosydar v. Wolman*, appeal pending, No. 72-1139. Accordingly, they argue that a "tax credit," as well as tuition assistance, violates the First Amendment.

In both *Lemon* and in *Walz v. Tax Commission*, 397 U.S. 664 (1970), where the "excessive entanglement" principle was first enunciated, this Court distinguished, in no uncertain terms, between the entangling effect of "a direct money subsidy" to a religious institution and the consequence of an indirect financial benefit such as tax relief for, or payments to, private individuals who may choose to share such a benefit with a religious institution. In the first case, there is a substantial likelihood of "sustained and detailed administrative relationships for enforcement of statutory or administrative standards" *Walz v. Tax Commission*, 397 U.S. at 675. In the second, there are only the usual relationships between the government and a taxpayer or between the government and a private recipient of public funds.

There are, of course, a host of welfare programs now being administered throughout the nation—on both local and national levels—which provide cash payments out of a public treasury to needy individuals. The beneficiaries are then free to use any part—or, indeed, all—of those payments for religious purposes. A recipient of Social Security, for example, may sign over his entire check to a church, and the payment is not viewed as an impermissible transfer of government funds to a religious institution or as "entanglement" by government in church affairs. Welfare recipients may also choose to contribute from their benefits to the church collection plate; the source of the funds does not prohibit or taint that voluntary act.

Tuition assistance is, of course, different from an unrestricted welfare grant in that it is given *only* to those who privately pay a nonpublic school for a child's education. But this precondition is a way the State has of ascertaining which individuals need the particular form of aid. It does not, *ipso facto*, justify a court in ignoring the actual recipient of the funds and his voluntary decisions and treating the payment as if it were made directly from the public treasury to the school. The New York statute, for example, does not provide an across-the-board subsidy which a private school can, entirely at its own option, convert into a tuition increase for all its students. By limiting beneficiaries to those whose incomes are at or slightly above the poverty level, New York has carried out a very real welfare purpose—it has significantly eased the heavy burden that this class of beneficiaries bears if its members choose private education (which may include religious training) over public education.

There is, as we have shown above, no danger of entanglement of the kind proscribed by *Walz* and *Lemon*. Indeed, the evils which *Walz* warned against—"sponsorship, financial support, and active involvement of the sovereign in religious activity" (397 U.S. at 668)—are simply not present when the State, in recognition of the cost to parents of private education and the extent to which their choice ameliorates the drain on the public treasury, gives the individual parents—and not the schools—some financial benefit that they may keep for themselves. If a parent decides to pass that benefit to a religious school, he is doing so of his own volition, and government is no more involved in "sponsorship" or "financial support" than it is when a federal employee gives a small percentage of his biweekly pay to his neighborhood church.

This is all the more true when the State's benefit is given not by way of a cash payment to the parent but by some form of tax relief. Surely a State may exempt from part of its income tax burden those who, in its view, draw less than the average citizen on State services. If, to remain with the subject of education, a state legislature granted tax relief to all taxpayers having no children (on the theory that they derived no direct benefit from the public school system), it could hardly be argued that the relief was arbitrary. Indeed, such an exemption would fit well with this Court's oft-stated view that taxation is the means by which the burdens of government costs are distributed among those who enjoy the benefits of government services. *Thomas v. Gay*, 169 U.S. 264, 276, 277 (1898); *Welch v. Henry*, 305 U.S. 134, 144 (1938).²

² See, for a traditional statement of this theory, Cooley, *The Law of Taxation* (4th ed.), § 89, p. 213:

If it were practicable to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit each receives from the protection the government affords him; but this is manifestly impossible. The value of life and liberty, and of the social and family rights and privileges cannot be measured by any pecuniary standard; and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated. This is upon the assumption, never wholly true in point of fact, but sufficiently near the truth for the practical operations of government, that the benefit received from the government bears some proportion to the property held, or the revenue enjoyed under its protection; and though this can never be arrived at with accuracy, through the operation of any general rule, and would not be wholly just if it could be, experience has given us no better standard, and it is applied in a great variety of forms, and with more or less approximations to justice and equality.

The test stated by the late Justice Frankfurter for a majority of this Court in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940), was "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." And, as the Court noted in that case, it is for state legislatures to devise "just and productive sources of revenue" and not for courts "to inject themselves in a merely negative way into the delicate processes of fiscal policy-making." 311 U.S. at 445.³

Accordingly, this Court has sustained local taxing provisions on a finding that they are based on grounds of difference having a fair and substantial relation to the object of the state legislation. *E.g.*, *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890); *Rogers v. Hennepin County*, 240 U.S. 184, 191 (1916);

³ See also *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 509-510 (1931) (citations omitted and emphasis added):

It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation.

Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. *It may make distinctions of degree having a rational basis*, and when subjected to judicial scrutiny they must be presumed to *rest on that basis if there is any conceivable state of facts which would support it*.

The restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution.

Louisville Gas Co. v. Coleman, 277 U.S. 32, 37, 40 (1928); *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 526-528 (1959).

Only a few weeks ago, this Court upheld an Illinois statute subjecting only corporations, and not individuals, to ad valorem taxes on personal property, citing many of its earlier cases, including *Carmichael v. Southern Coal Co.*, note 3, *supra*. The Court held again that in taxation, even more than in other fields, legislatures possess the greatest freedom of classification, which can be overcome only by an explicit demonstration that the classification is constitutionally impermissible. *Lehnhausen v. Lake Shore Auto Parts Co.*, Nos. 71-685 and 71-691, decided February 22, 1973.

The New York legislature has determined, in Sections 3, 4 and 5 of the statute here under attack, that it is equitable to recognize in the tax structure the fact that New York State spent an average of \$610 per child to provide public school education in 1969-1970, and that a parent who refrains from using the public schools for his children is saving public funds. As an intermediate New York court put it (*St. Barbara's Roman Catholic Church v. City of New York*, 243 App. Div. 371, 374, 277 N.Y. Supp. 538, 541 (1935)):

No doubt this parochial school is enabled to function to the advantage of the State and City, in large measure through the services of the members of this society. The taxes which the Legislature by the statute quoted requires the city to forego are infinitesimal in amount compared with the cost to the community to educate the pupils of this parochial school should it become necessary to do so by different public facilities. The purely monetary benefit which accrues to the city through this exemption by the Legislature far exceeds in amount the taxes cancelled.

Is it constitutionally impermissible for New York (or Pennsylvania or Ohio) to take account of these savings by alleviating, in some slight degree, the tax burden of the parents whose choice makes them possible? What New York has done by its tax relief statute parallels the relief provision on Section 319 of the Social Security Act of 1965, which recognized that members of the Amish church were opposed, by reason of conscience, to old-age insurance, including Social Security. Since they refuse the benefits of Social Security, the Amish are now justly exempted from federal FICA and self-employment taxes by Sections 1402(h) of the Internal Revenue Code. This tax waiver is presently worth almost \$600 a year to an employed person earning \$10,000 and over \$800 to a self-employed person with the same income. Whether or not some part of the tax benefit is used for religious purposes, the exemption is an equitable and fair means of allocating a tax burden.

The tax structure provides many varied incentives for the expenditure of private funds—often in a way which could not be countenanced by direct grants from the public treasury. The deductibility of mortgage interest and local property taxes is an incentive to home ownership, although direct grants to individuals to buy homes has not been thought proper. Nor could the federal government pay a cash subsidy to every man and woman who marry; yet the financial advantages of a joint income-tax return amount to a public bounty for those who marry. The same is, of course, true of the deductibility from gross income of contributions to churches and religious organizations. All these provisions, along with tax credits for retirement income (I.R.C. § 37), investment in new machinery

(§ 38), foreign income taxes (§ 901), and expenditures for work incentive programs (§ 40) are part of a permissible tax structure. Indeed, even the financing of state and local election campaigns—which might present serious constitutional questions if funding were provided directly—is now the subject of a tax credit provision. See § 41 of the Internal Revenue Code.

It is no answer to maintain, as the plaintiffs have done (and as the district court did in *Kosydar v. Wolman, supra*) that the beneficiaries of the reduced tax are overwhelmingly Roman Catholics and that the law is, therefore, a means of benefiting one religious faith. This argument—which would invalidate the law on the ground that its “primary effect” is to aid religion—rests on premises which have never been accepted in constitutional litigation and which would have mischievous consequences. Would it be a basis for declaring a local welfare law unconstitutional that a plaintiff could demonstrate that an overwhelming majority of recipients are black? Are the federal Economic Opportunity statutes violative of the Equal Protection Clause because they benefit principally Mexican-Americans, blacks and other racial or national minorities? Surely the fact that a generally desirable public welfare law may be of more advantage to individuals who adhere to religious faiths than to others does not totally invalidate its purpose or render its effect unconstitutional. In *McGowan v. Maryland*, 366 U.S. 420 (1961), this Court sustained Sunday Closing legislation even though the selection of Sunday as the uniform day of rest favored religions that observe that particular day. “The ‘Establishment’ Clause,” the Court noted, “does not bar federal or state regulation of conduct whose reason or effect

merely happens to coincide or harmonize with the tenets of some or all religions." 366 U.S. at 442. Similarly, the fact that a large majority of the parents who send their children to nonpublic schools today are motivated by religious convictions should not invalidate a law that offers the same benefit to all, whether they attend religious or totally secular private schools. Indeed, notwithstanding the assertions made by the plaintiffs and certain *amici*, the effect of such legislation may well be to increase the percentage of nonpublic-school students who attend *secular* private schools where no religion whatever is taught. New York and Pennsylvania should not be prohibited from achieving that goal merely because most of *today's* beneficiaries are of the Catholic faith.

II

THE LEGISLATIVE JUDGMENT IN "TRAVERSING THE TIGHT ROPE" BETWEEN ESTABLISHING AND FREE EXERCISE SHOULD BE GIVEN GREAT DEFERENCE BY THIS COURT

In substantially all the religion cases of the past several Terms this Court has recognized that there is an ultimate conflict between the Establishment and Free Exercise Clauses of the First Amendment taken to their logical extremes. See, *e.g.*, *Walz v. Tax Commission*, 397 U.S. 664, 668-669 (1970). No fact situation presents that conflict more strikingly than the difficult dilemma of conscientious parents who feel compelled by religious conviction to send their children to schools where they can be given religious training along with the secular knowledge that is needed by every responsible citizen in our society. Jewish parents in low or moderate income brackets face cruel and heartbreaking decisions when they are forced to spend between \$500

and \$1500 per year to educate a child in the kind of school which their religious faith demands. For an observant Jew, the duty of imparting a thorough knowledge of Judaism is a religious precept of the first magnitude; the obligation "to teach [Torah] diligently unto thy children" (*Deuteronomy* 6:-7) is on a par with the observance of the Sabbath and the other most important divine commands. The experience of the Jewish people in the Soviet Union—where religious education is generally unavailable—demonstrates how essential to the survival of the faith is the continued existence of Jewish day schools. Jewish education is, in short, of the same importance and magnitude to the Jewish faith as the principle of separation from worldly education is to the Amish. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Because of spiraling educational costs, many observant Jews are today forced to the cruel choice of abandoning this aspect of their religious faith simply in order to feed their families. Do not the policies of the Free Exercise Clause and the principles of religious and cultural pluralism on which this nation are based authorize a state legislature—or, for that matter, the Congress—to take ameliorative steps to prevent the eradication of religious schools?

In an area where no "absolutely straight line" can be drawn and where, by the very nature of the constitutional principles, there must be "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz v. Tax Commission*, 397 U.S. 664, 669 (1970)), the legislative judgment as to how to "traverse the 'tight rope'" (397 U.S. at 672) should be accorded great deference. In this field,

as in the enforcement of the Equal Protection Clause of the Fourteenth Amendment, it suffices, therefore, for this Court "to perceive a basis upon which the Congress [or the State legislature] might resolve the conflict as it did." *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966).

The analogy to enforcement of the Equal Protection Clause is, we submit, borne out by the nature of the danger against which the Establishment Clause protects. For, as the Court observed in *Walz*, the ultimate goal is to avoid "excessive government entanglement with religion" (397 U.S. at 674) while preserving "the autonomy and freedom of religious bodies" (*Id.* at 672). The many factors which enter into this accommodation are similar in kind and degree to the "various conflicting considerations" enumerated in *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). Weighing the degree to which government agencies will become involved in religious affairs under a scheme of State financing of secular education is a function for which a court is ill-suited. A legislature, on the other hand, may consider what alternatives are available for the improvement of educational standards and can devise techniques for avoiding the entanglement which the Constitution forbids. It is also in a far better position to weigh the public need for financial assistance of the kind provided by the challenged statutes and the effect on the welfare of the State and the Nation if it is withheld from religiously affiliated institutions.⁴

⁴ See, e.g., Kauper, "Government and Religion: The Search for Absolutes," 15 *Michigan Law Quadrangle Notes* (1971):

In short, the courts may in an appropriate gesture of modesty recognize that they do not have all the wisdom in these matters:

A final word must be said on the pernicious and deplorable assertion which is again made in this case by certain *amici* that the statutes are constitutionally invalid because they authorize payment from the public treasury to racially segregated schools. We view it as particularly unfortunate that this claim is injected by Jewish organizations, who rely not on evidence in the record, but on their own assessments of what may be "substantiated at trial" (See Brief of American Jewish Committee, *et al.*, Nos. 72-459, 72-620, pp. 25-34). To even suggest an analogy between the establishment and financing in the South of private "academies" designed for no purpose other than the preservation of racial segregation and the operation and support of Jewish religious schools—which are part of a glorious tradition of learning dating back more than 3,000 years—is highly offensive to us and to the many American citizens of the Jewish faith whom we represent. The Biblical command incumbent upon each adult male of the Jewish faith to provide religious instruction for his children neither awaited nor depended upon the outcome of *Brown v. Board of Education*, 347 U.S. 483 (1954). And the eligibility of the more than 400 Jewish day schools—established in this country to enable the parents of the approximately 70,000 children now attending them to fulfill this Biblical obligation while affording them a complete secular education—should not, by the same token, turn on the racial distribution of students at the schools. It is plain that neither as to the schools affected here, nor as

that there is latitude for some play in the joints; and that in the area of church-state relations as in all other areas of public concern where policy considerations loom large, it is not inappropriate to leave the determination of some issues to the operation of the democratic process.

to the legislative programs which are challenged, can it be said that their "purpose, motive and effect . . . is to unconstitutionally circumvent the requirement first enunciated in *Brown v. Board of Education*" *Brown v. South Carolina State Board*, 296 F. Supp. 199 (D.S.C. 1968), *affirmed*, 393 U.S. 222 (1968).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court in Nos. 72-753, 72-791, and 72-929, and affirm the judgment of the District Court in No. 72-694.⁵

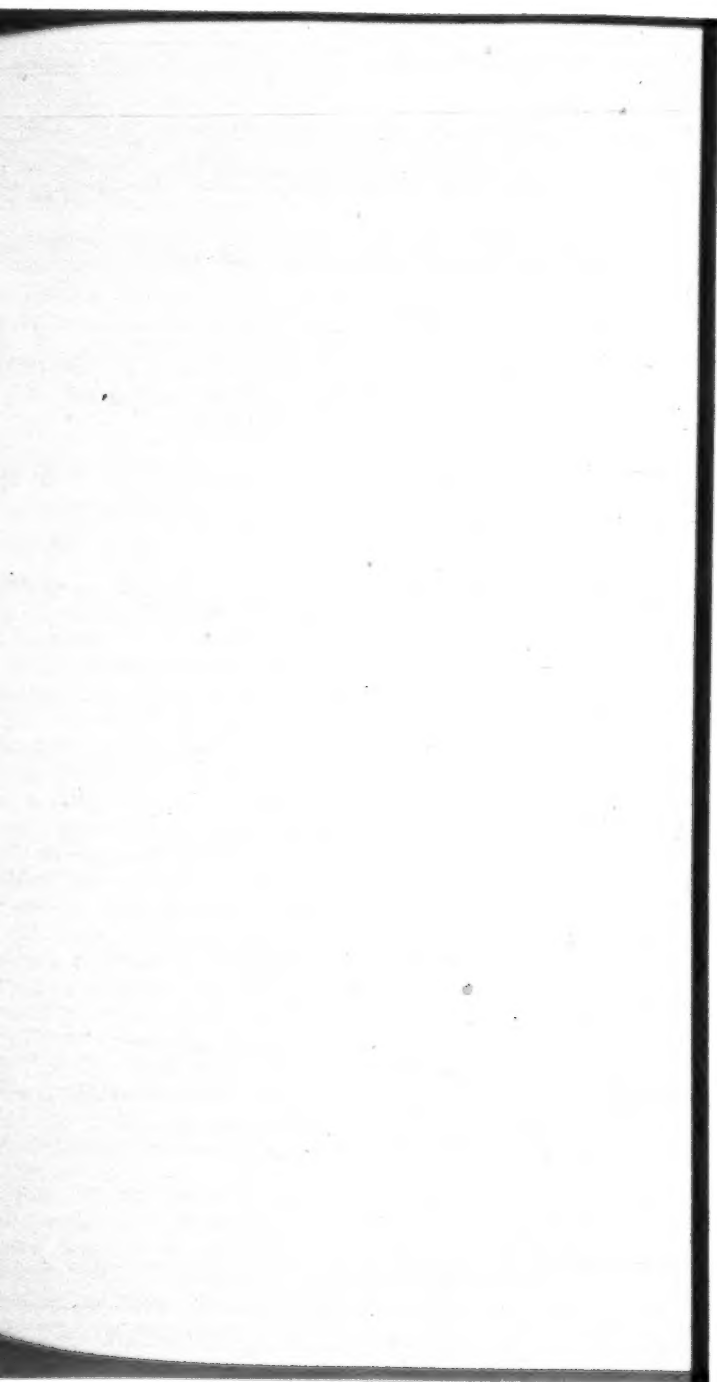
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⁵ For the same reasons, the judgment of the District Court in Nos. 72-459 and 72-620 should be reversed.



NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 300 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. v. NYQUIST ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. 72-694. Argued April 16, 1973—Decided June 25, 1973*

Amendments to New York's Education and Tax Laws established three financial aid programs for nonpublic elementary and secondary schools. The first section provides for direct money grants to "qualifying" nonpublic schools to be used for "maintenance and repair" of facilities and equipment to ensure the students' "health, welfare and safety." A "qualifying" school is a nonpublic, non-profit elementary or secondary school serving a high concentration of pupils from low-income families. The annual grant is \$30 per pupil, or \$40 if the facilities are more than 25 years old, which may not exceed 50% of the average per-pupil cost for equivalent services in the public schools. Legislative findings concluded that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools"; that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children" in low-income urban areas; and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." Section 2 establishes a tuition reimbursement plan for parents of children attending nonpublic elementary or secondary schools. To qualify, the parent's annual taxable income must be less than \$5,000. The amount of reimbursement is \$50 per grade

*Together with No. 72-753, *Anderson v. Committee for Public Education & Religious Liberty et al.*; No. 72-791, *Nyquist, Commissioner of Education of New York, et al. v. Committee for Public Education & Religious Liberty et al.*; and No. 72-929, *Cherry et al. v. Committee for Public Education & Religious Liberty et al.*, also on appeal from the same court.

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school child and \$100 per high school student so long as those amounts do not exceed 50% of actual tuition paid. The legislature found that the right to select among alternative educational systems should be available in a pluralistic society, and that any sharp decline in nonpublic school pupils would massively increase public school enrollment and costs, seriously jeopardizing quality education for all children. Reiterating a declaration contained in the first section, the findings concluded that "such assistance is clearly secular, neutral and nonideological." The third program, contained in §§ 3, 4, and 5 of the challenged law, is designed to give tax relief to parents failing to qualify for tuition reimbursement. Each eligible taxpayer-parent is entitled to deduct a stipulated sum from his adjusted gross income for each child attending a nonpublic school. The amount of the deduction is unrelated to the amount of tuition actually paid and decreases as the amount of taxable income increases. These sections are also prefaced by a series of legislative findings similar to those accompanying the previous sections. Almost 20% of the State's students, some 700,000 to 800,000, attend nonpublic schools, approximately 85% of which are church-affiliated. While practically all the schools entitled to receive maintenance and repair grants "are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree," institutions qualifying under the remainder of the statute include a substantial number of other church-affiliated schools. The District Court held that § 1, the maintenance and repair grants, and § 2, the tuition reimbursement grants, were invalid, but that the income tax provisions of §§ 3, 4, and 5 did not violate the Establishment Clause. *Held*:

1. The propriety of a legislature's purpose may not immunize from further scrutiny a law that either has a primary effect that advances religion, or that fosters excessive Church-State entanglements. Pp. 14-15.

2. The maintenance and repair provisions of the New York statute violate the Establishment Clause because their inevitable effect is to subsidize and advance the religious mission of sectarian schools. This section does not properly guarantee the secularity of state aid by limiting the percentage of assistance to 50% of comparable aid to public schools. Such statistical assurances fail to provide an adequate guarantee that aid will not be utilized to advance the religious activities of sectarian schools. Pp. 16-21.

3. The tuition reimbursement grants, if given directly to sectarian schools, would similarly violate the Establishment Clause, and the fact that they are delivered to the parents rather than the

Syllabus

schools does not compel a contrary result, as the effect of the aid is unmistakably to provide financial support for nonpublic, sectarian institutions. Pp. 22-30.

(a) The fact that the grant is given as reimbursement for tuition already paid, and that the recipient is not required to spend the amount received on education, does not alter the effect of the law. Pp. 26-28.

(b) The argument that the statute provides "a statistical guarantee of neutrality" since the tuition reimbursement is only 15% of the educational costs in nonpublic schools and the compulsory education laws require more than 15% of school time to be devoted to secular courses, is merely another variant of the argument rejected as to maintenance and repair costs. P. 28.

(c) The State must maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion, and it cannot by designing a program to promote the free exercise of religion erode the limitations of the Establishment Clause. Pp. 29-30.

4. The system of providing income tax benefits to parents of children attending New York's nonpublic schools also violates the Establishment Clause because, like the tuition reimbursement program, it is not sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools. *Walz v. Tax Commission*, 397 U. S. 664, distinguished. Pp. 30-35.

5. Because the challenged sections have the impermissible effect of advancing religion, it is not necessary to consider whether such aid would yield an entanglement with religion. But it should be noted that, apart from any administrative entanglement of the State in particular religious programs, assistance of the sort involved here carries grave potential for entanglement in the broader sense of continuing and expanding political strife over aid to religion. Pp. 35-38.

350 F. Supp. 655, affirmed in part and reversed in part.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in Part II-A of the Court's opinion, in which REHNQUIST, J., joined, and dissenting from Parts II-B and II-C, in which WHITE and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in those portions of which relating to Parts II-B and II-C of the Court's opinion, BURGER, C. J., and REHNQUIST, J., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined.

NOTICE : This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 72-694, 72-753, 72-791, AND 72-929

Committee for Public Education
and Religious Liberty et al.,
Appellants,

72-694 v.

Ewald B. Nyquist, as Commis-
sioner of Education of the
State of New York, et al.

Warren M. Anderson, as Majority
Leader and President pro tem
of the New York State
Senate, Appellant,

72-753 v.

Committee for Public Education
and Religious Liberty et al.

Ewald B. Nyquist, as Commis-
sioner of Education of the
State of New York,
et al., Appellants,

72-791 v.

Committee for Public Education
and Religious Liberty et al.

Priscilla L. Cherry et al.,
Appellants,

72-929 v.

Committee for Public Education
and Religious Liberty et al.

On Appeals from the
United States Dis-
trict Court for the
Southern District of
New York.

[June 25, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently enacted New York law which provides finan-

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cial assistance, in several ways, to nonpublic elementary and secondary schools in that State. The case involves an intertwining of societal and constitutional issues of the greatest importance.

James Madison, in his Memorial and Remonstrance Against Religious Assessments,¹ admonished that a "prudent jealousy" for religious freedoms required that they never become "entangled . . . in precedents."² His strongly held convictions, coupled with those of Thomas Jefferson and others among the Founders, are reflected in the first Clauses of the First Amendment of the Bill of Rights, which state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."³ Yet, despite Madison's admonition and the "sweep of the absolute prohibition" of the Clauses,⁴ this Nation's history has not been one of en-

¹ Madison's Memorial and Remonstrance was the catalytic force occasioning the defeat in Virginia of an Assessment Bill designed to extract taxes in support of teachers of the Christian religion. See n. 19, *supra*. See also *Everson v. Board of Education*, 330 U. S. 1, 28, 33-41 (1947) (Rutledge, J., dissenting).

² Madison's often quoted declaration is reprinted as an appendix to the dissenting opinions of Mr. Justice Rutledge and Mr. Justice DOUGLAS in *Everson v. Board of Education*, 330 U. S., at 63, 65, and *Walz v. Tax Comm'n*, 397 U. S. 664, 700, 719, 721 (1970), respectively.

³ The provisions of the First Amendment have been made binding on the States through the Due Process Clause of the Fourteenth Amendment. See, e. g., *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

⁴ *Walz v. Tax Comm'n*, *supra*, at 668. MR. CHIEF JUSTICE BURGER, writing for the Court, noted that the purpose of the Clauses "was to state an objective, not to write a statute," and that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.*, at 668-669.

tirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court. Those cases have occasioned thorough and thoughtful scholarship by several of this Court's most respected former Justices, including Justices Black, Frankfurter, Harlan, Jackson, Rutledge, and Chief Justice Warren.

As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of "entangling" precedents. Neither, however, may it be said that Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed for the University of Virginia. *McCullum v. Board of Education*, 333 U. S. 203, 232, 238 (1948) (Jackson, J., separate opinion). Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined. Our task, therefore, is to assess New York's several forms of aid in the light of principles already delineated.⁵

⁵ The existence, at this stage of the Court's history, of guiding principles etched over the years in difficult cases does not, however, make our task today an easy one. For it is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no "bright line" guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U. S. 602, 612 (1971). And, at least where questions of entanglements are involved, the Court has acknowledged

I

In May 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three distinct financial aid programs for non-public elementary and secondary schools. Almost immediately after the signing of these measures a complaint was filed in the United States District Court for the Southern District of New York challenging each of the three forms of aid as violative of the Establishment Clause. The plaintiffs were an unincorporated association, known as the Committee for Public Education and Religious Liberty (PEARL), and several individuals who were residents and taxpayers in New York, some of whom had children attending public schools. Named as defendants were the State Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance. Motions to intervene on behalf of defendants were granted to a group of parents with children enrolled in nonpublic schools, and to the Majority Leader and President pro tem of the New York State Senate.* By consent of the parties, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2283, and the case was decided without an evidentiary hearing. Because the questions before the District Court were resolved on the basis of the pleadings, that court's decision turned on the constitutionality of each provision on its face.

The first section of the challenged enactment, entitled "Health and Safety Grants for Nonpublic School Chil-

that, as of necessity, the "wall" is not without bends and may constitute a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.*, at 614.

*The motion was granted in favor of Mr. Earl W. Brydges. Upon his retirement in December 1972, his successor, Mr. Warren M. Anderson, was substituted in his place.

dren,"⁷ provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils."⁸ A "qualifying" school is any nonpublic, nonprofit elementary or secondary school which "has been designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U. S. C. § 425)."⁹ Such schools are entitled to receive a grant of \$30 per pupil per year, or \$40 per pupil per year if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an audited statement of its expenditures for maintenance and repair during the preceding year, and its grant may not exceed the total of such expenses. The Commissioner is also required to ascertain the average per-pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" is defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils."¹⁰ This section is prefaced by a series of legislative findings which shed light on the State's purpose in enacting the law. These findings con-

⁷ N. Y. Laws 1972, c. 414, § 1, amending N. Y. Educ. Law, Art. 12, §§ 549-553 (McKinney Supp. 1972).

⁸ *Id.*, § 550 (5).

⁹ *Id.*, § 550 (2).

¹⁰ *Id.*, § 550 (6).

clude that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools"; that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children" in low-income urban areas; and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." For these reasons, the statute declares that "the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."¹¹

The remainder of the challenged legislation—§§ 2 through 5—is a single package captioned the "Elementary and Secondary Education Opportunity Program." It is composed, essentially, of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools.¹² To qualify under this section the parent must have an annual taxable income of less than \$5,000. The amount of reimbursement is limited to \$50 for each grade school child and \$100 for each high school child. Each parent is required, however, to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of state reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.

This section, like § 1, is prefaced by a series of legislative findings designed to explain the impetus for the State's action. Expressing a dedication to the "vitality of

¹¹ *Id.*, § 549.

¹² N. Y. Laws 1972, c. 414, § 2, amending N. Y. Educ. Law, Art. 12-A, §§ 559-563 (McKinney Supp. 1972).

our pluralistic society," the findings state that a "healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences."¹³ The findings further emphasize that the right to select among alternative educational systems "is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated."¹⁴ Turning to the public schools, the findings state that any "precipitous decline in the number of non-public school pupils would cause a massive increase in public school enrollment and costs," an increase that would "aggravate an already serious fiscal crisis in public education" and would "seriously jeopardize the quality education for all children."¹⁵ Based on these premises, the statute asserts the State's right to relieve the financial burden of parents who send their children to nonpublic schools through this tuition reimbursement program. Repeating the declaration contained in § 1, the findings conclude that "such assistance is clearly secular, neutral and nonideological."¹⁶

The remainder of the "Elementary and Secondary Education Opportunity Program," contained in §§ 3, 4, and 5 of the challenged law,¹⁷ is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement. Under these sections parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least \$50 in nonpublic school

¹³ *Id.*, § 559 (1).

¹⁴ *Id.*, § 559 (2).

¹⁵ *Id.*, § 559 (3).

¹⁶ *Id.*, § 559 (4).

¹⁷ N. Y. Laws 1972, c. 414, §§ 3, 4, and 5, amending N. Y. Tax Law, §§ 612 (e), 612 (j) (McKinney Supp. 1972).

tuition. If the taxpayer's adjusted gross income is less than \$9,000 he may subtract \$1,000 for each of as many as three dependents. As the taxpayer's income rises, the amount he may subtract diminishes. Thus, if a taxpayer has adjusted gross income of \$15,000, he may subtract only \$400 per dependent, and if his income is \$25,000 or more, no deduction is allowed.¹⁸ The amount of the deduction is not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and is given in addition to any deductions to which the taxpayer may be entitled for other religious or charitable contributions. As indicated in the memorandum from the Majority Leader and President pro tem of the Senate, submitted to each New York legislator during consideration of the bill, the actual tax benefits under these provisions were carefully calculated in advance.¹⁹ Thus, comparable tax benefits pick up at approximately the point at which tuition reimbursement benefits leave off.

While the scheme of the enactment indicates that the purposes underlying the promulgation of the tuition reimbursement program should be regarded as pertinent as well to these tax law sections, § 3 does contain an additional series of legislative findings. Those findings may

¹⁸ Section 5 contains the following table:

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than \$9,000	\$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	—0—

Id., § 612 (j) (1).

[Footnote 19 is on p. 9]

be summarized as follows: (i) contributions to religious, charitable and educational institutions are already deductible from gross income; (ii) nonpublic educational institutions are accorded tax exempt status; (iii) such institutions provide educations for children attending them and also serve to relieve the public school systems of the burden of providing for their education; and, therefore, (iv) the "legislature . . . finds and determines that similar modifications . . . should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents."²⁰

Although no record was developed in this case, a number of pertinent generalizations may be made about the nonpublic schools which would benefit from these enactments. The District Court, relying on findings in a similar case recently decided by the same court,²¹ adopted a profile of these sectarian, nonpublic schools similar to the one suggested in the plaintiffs' complaint. Qualify-

²⁰ The following computations were submitted by Senator Brydges, who has been replaced as intervenor by his successor, Senator Anderson:

If Adjusted Gross Income is	Estimated Net Benefit to Family		
	One child	Two children	Three or more
less than \$ 9,000	\$50.00	\$100.00	\$150.00
\$ 9,000-10,999	42.50	85.00	127.50
11,000-12,999	42.00	84.00	126.00
13,000-14,999	38.50	77.00	115.50
15,000-16,999	32.00	64.00	96.00
17,000-18,999	22.50	45.00	67.50
19,000-20,999	15.00	30.00	45.00
21,000-22,999	13.75	27.50	41.25
23,000-24,999	12.00	24.00	36.00
25,000 and over	0	0	0

²⁰ N. Y. Tax Law, § 612 (j) (McKinney Supp. 1972) (accompanying notes).

²¹ *Comm. for Public Educ. & Religious Liberty v. Levitt*, 342 F. Supp. 439, 440-441 (SDNY 1972), *aff'd, post*, at —.

ing institutions, under all three segments of the enactment, could be ones that:

"(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach." 350 F. Supp., at 663.

Of course, the characteristics of individual schools may vary widely from that profile. Some 700,000 to 800,000 students, constituting almost 20% of the State's entire elementary and secondary school population, attend over 2,000 nonpublic schools, approximately 85% of which are church-affiliated. And while "all or practically all" of the 280 schools²² entitled to receive "maintenance and repair" grants "are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree," *id.*, at 661, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episcopal, Seventh Day Adventist, and other church-affiliated schools.²³

²² As indicated in the District Court's opinion, it has been estimated that 280 schools would qualify for such grants. The relevant criteria for determining eligibility are set out in 20 U. S. C. § 425, and the central test is whether the school is one "in which there is a high concentration of students from low-income families."

²³ In the fall of 1968, there were 2,038 nonpublic schools in New York State; 1,415 Roman Catholic; 164 Jewish; 59 Lutheran; 49 Episcopal; 37 Seventh Day Adventist; 18 other church-affiliated; 296 without religious affiliation. N. Y. State Educ. Dept., Financial Support—Nonpublic Schools 3 (1969).

Plaintiffs argued below that because of the substantially religious character of the intended beneficiaries, each of the State's three enactments offended the Establishment Clause. The District Court, in an opinion carefully canvassing this Court's recent precedents, held unanimously that § 1 (maintenance and repair grants) and § 2 (tuition reimbursement grants) were invalid. As to the income tax provisions of §§ 3, 4, and 5, however, a majority of the District Court, over the dissent of Circuit Judge Hays, held that the Establishment Clause had not been violated. Finding the provisions of the law severable, it enjoined permanently any further implementation of §§ 1 and 2 but declared the remainder of the law independently enforceable. The plaintiffs appealed directly to this Court, challenging the District Court's adverse decision as to the third segment of the statute.²⁴ The defendant state officials have appealed so much of the court's decision as invalidates the first and second portions of the 1972 law,²⁵ the intervenor Majority Leader and President pro tem of the Senate also appeals from those aspects of the lower court's opinion,²⁶ and the intervening parents of non-public school children have appealed only from the decision as to § 2.²⁷ This Court noted probable jurisdiction over each appeal and ordered the cases consolidated for oral argument. 410 U. S. 907 (1973). Thus, the constitutionality of each of New York's recently promulgated aid provisions is squarely before us. We affirm

²⁴ No. 72-694, *Committee for Public Education and Religious Liberty v. Nyquist* (hereinafter "appellants").

²⁵ No. 72-791, *Nyquist v. Committee for Public Education and Religious Liberty* (hereinafter "appellees").

²⁶ No. 72-753, *Anderson v. Committee for Public Education and Religious Liberty* (hereinafter "appellee" or "intervenor").

²⁷ No. 72-929, *Cherry v. Committee for Public Education and Religious Liberty* (hereinafter "appellee" or "intervenor").

the District Court insofar as it struck down §§ 1 and 2 and reverse its determination regarding §§ 3, 4, and 5.

II

The history of the Establishment Clause has been recounted frequently and need not be repeated here. See *Everson v. Board of Education*, 330 U. S. 1 (Black, J., opinion of the Court), 28 (Rutledge, J., dissenting) (1947);²⁸ *McCullum v. Board of Education*, 333 U. S.

²⁸ Virginia's experience, examined at length in the majority and dissenting opinions in *Everson*, constitutes one of the greatest chapters in the history of this Country's adoption of the essentially revolutionary notion of separation between Church and State. During the Colonial Era and into the late 1700's, the Anglican Church appeared firmly seated as the established church of Virginia. But in 1776, assisted by the persistent efforts of Baptists, Presbyterians, and Lutherans, the Virginia Convention approved a provision for its first constitution's Bill of Rights calling for the free exercise of religion. The provision, drafted by George Mason and substantially amended by James Madison, stated "[t]hat religion . . . and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion according to the dictates of conscience"

But the Virginia Bill of Rights contained no prohibition against the Establishment of Religion, and the next eight years were marked by debate over the relationship between Church and State. In 1784, a bill sponsored principally by Patrick Henry, entitled A Bill Establishing a Provision for Teachers of the Christian Religion, was brought before the Virginia Assembly. The Bill, reprinted in full as an Appendix to Mr. Justice Rutledge's dissenting opinion in *Everson v. Board of Education*, *supra*, at 72-74, required all persons to pay an annual tax "for the support of the Christian religion" in order that the teaching of religion might be promoted. Each taxpayer was permitted under the Bill to declare which church he desired to receive his share of the tax. The Bill was not voted on during the 1784 session, and prior to the convening of the 1785 session Madison penned his Memorial and Remonstrance against Religious Assessments, outlining in 15 numbered paragraphs the reasons for his opposition to the Assessments Bill. The document

203, 212 (1948) (Frankfurter, J., separate opinion); *McGowan v. Maryland*, 366 U. S. 420 (1961); *Engel v. Vitale*, 370 U. S. 421 (1962). It is enough to note that it is now firmly established that a law may be one "respecting the establishment of religion" even though its consequence is not to promote a "state religion," *Lemon v. Kurtzman*, 403 U. S. 602, 612 (1971), and even though it does not aid one religion more than another but merely benefits all religions alike. *Everson v. Board of Education*, *supra*, at 15. It is equally well established, however, that not every law that confers an "indirect," "remote," or "incidental" benefit upon religious institutions

was widely circulated and inspired such overwhelming opposition to the Bill that it died during the ensuing session without reaching a vote. Madison's Memorial and Remonstrance, recognized today as one of the cornerstones of the First Amendment's guarantee of government neutrality toward religion, also provided the necessary foundation for the immediate consideration and adoption of Thomas Jefferson's Bill for Establishing Religious Freedom, which contained Virginia's first acknowledgement of the principle of total separation of Church and State. The core of that principle, as stated in the Bill, is that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever" In Jefferson's perspective, so vital was this "wall of separation" to the perpetuation of democratic institutions that it was this Bill, along with his authorship of the Declaration of Independence and the founding of the University of Virginia, that he wished to have inscribed on his tombstone. Report of the Comm'n on Constitutional Revision, *The Constitution of Virginia* 100-101 (1969).

Both Madison's Bill of Rights provision on the free exercise of religion and Jefferson's Bill for Establishing Religious Freedom have remained in the Virginia Constitution, unaltered in substance, throughout that State's history. See Va. Const. art. I, § 16, in which the two guarantees have been brought together in a single provision. For comprehensive discussions of the pertinent Virginia history, see S. Cobb, *The Rise of Religious Liberty in America* 74-115, 400-499 (Reprinted 1970); James, *The Struggle for Religious Liberty in Virginia* (1900); I. Brant, *James Madison The Nationalist 1780-1787*, 343-355 (1948).

is, for that reason alone, constitutionally invalid. *Id.*; *McGowan v. Maryland*, *supra*, at 450; *Walz v. Tax Comm'n*, 397 U. S. 664, 671-672, 674-675 (1970). What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects. Primary among those evils have been "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, *supra*, at 668; *Lemon v. Kurtzman*, *supra*, at 612.

Most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education. Among these religion-education precedents, two general categories of cases may be identified: those dealing with religious activities within the public schools,²⁹ and those involving public aid in varying forms to sectarian educational institutions.³⁰ While the New York legislation places this case in the latter category, its resolution requires consideration not only of the several aid-to-sectarian-education cases but also of our other education precedents and of several important noneducation cases. For the now well defined three-part test that has emerged from our decisions

²⁹ *McCollum v. Board of Educ.*, *supra* ("release time" from public education for religious education); *Zorach v. Clauson*, 343 U. S. 306 (1952) (also a "release time" case); *Engel v. Vitale*, 370 U. S. 421 (1962) (prayer reading in public schools); *School Dist. of Abington Township v. Schempp*, 374 U. S. 203 (1963) (Bible reading in public schools); *Epperson v. Arkansas*, 393 U. S. 97 (1968) (anti-evolutionary limitation on public school study).

³⁰ *Everson v. Board of Educ.*, *supra* (bus transportation); *Board of Educ. v. Allen*, 392 U. S. 236 (1968) (textbooks); *Lemon v. Kurtzman*, *supra* (teachers' salaries, textbooks, instructional materials); *Earley v. DiCenso*, 403 U. S. 602 (1971) (teachers' salaries); *Tilton v. Richardson*, 403 U. S. 672 (1971) (secular college facilities).

is a product of considerations derived from the full sweep of the Establishment Clause cases. Taken together these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, *e. g.*, *Epperson v. Arkansas*, 393 U. S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, *e. g.*, *McGowan v. Maryland*, *supra*; *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963), and, third, must avoid excessive government entanglement with religion, *e. g.*, *Walz v. Tax Comm'n*, *supra*. See *Lemon v. Kurtzman*, *supra*, at 612-613; *Tilton v. Richardson*, 403 U. S. 672, 678 (1971).³¹

In applying these criteria to the three distinct forms of aid involved in this case, we need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its school children. And we do not doubt—indeed, we fully recognize—the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might

³¹ In discussing the application of these "tests," MR. CHIEF JUSTICE BURGER noted in *Tilton v. Richardson*, *supra*, that "there is no single constitutional caliper that can be used to measure the precise degree" to which any one of them is applicable to the state action under scrutiny. Rather, these tests or criteria should be "viewed as guidelines" within which to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause." *Id.*, at 677-678.

suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State. Accordingly, we must weigh each of the three aid provisions challenged here against these criteria of effect and entanglement.

A

The "maintenance and repair" provisions of § 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low income areas. The grants, totaling \$30 or \$40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salary of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

The state officials nevertheless argue that these expenditures for "maintenance and repair" are similar to other financial expenditures approved by this Court. Primarily they rely on *Everson v. Board of Education*, *supra*; *Board of Education v. Allen*, *supra*; and *Tilton v. Richardson*, *supra*. In each of those cases it is true that the Court approved a form of financial assistance which conferred undeniable benefits upon private, sectarian schools. But a close examination of those cases illuminates their distinguishing characteristics. In *Everson*, the Court, in a five-to-four decision, approved a program of reimbursements to parents of public as well as parochial school children for bus fares paid in connection with transportation to and from school, a program which the Court characterized as approaching the "verge" of impermissible state aid. 330 U. S., at 16. In *Allen*, decided some 20 years later, the Court upheld a New York law authorizing the provision of *secular* textbooks for all children in grades seven through 12 attending public and nonpublic schools. Finally, in *Tilton*, the Court upheld federal grants of funds for the construction of facilities to be used for clearly *secular* purposes by public and nonpublic institutions of higher learning.

These cases simply recognize that sectarian schools perform secular, educative functions as well as religious functions, and that some forms of aid may be channelled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect

and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law. In *McGowan v. Maryland*, *supra*, Sunday Closing Laws were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services. Also, in *Walz v. Tax Commission*, *supra*, property tax exemptions for church property were held not violative of the Establishment Clause despite the fact that such exemptions relieved churches of a financial burden.

Tilton draws the line most clearly. While a bare majority was there persuaded, for the reasons stated in the plurality opinion and in Mr. JUSTICE WHITE's concurrence, that carefully limited construction grants to colleges and universities could be sustained, the Court was unanimous in its rejection of one clause of the federal statute in question. Under that clause, the Government was entitled to recover a portion of its grant to a sectarian institution in the event that the constructed facility was used to advance religion by, for instance, converting the building to a chapel or otherwise allowing it to be "used to promote religious interests." 403 U. S., at 683. But because the statute provided that the condition would expire at the end of 20 years, the facilities would thereafter be available for use by the institution for any sectarian purpose. In striking down this provision, the plurality opinion emphasized that "[l]imiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period." *Ibid.* And in that event, "the original federal grant will in part have the effect of advancing religion." *Ibid.* See also *id.*, at 692 (DOUGLAS, J., dissenting), 659-661 (BRENNAN, J., dissenting), 665 n. 1 (WHITE, J., concurring in the judgment). If tax-raised funds may not be granted to in-

stitutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools³² for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.³³

It might be argued, however, that while the New York "maintenance and repair" grants lack specifically articulated secular restrictions, the statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. The legislature's supposition might have been that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep in sectarian schools. The shortest answer to this argument is that the statute itself allows, as a ceiling, grants satisfying the entire "amount of expenditures for maintenance and repair of such

³² The plurality in *Tilton* was careful to point out that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.*, at 685. See *Hunt v. McNair*, *post*.

³³ Our Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that "a page of history is worth a volume of logic." See *Walz v. Tax Commission*, *supra*, at 675-676 (citing *New York Trust Co. v. Eisner*, 256 U. S. 345, 349 (1921)). In *Everson*, Mr. Justice Black surveyed the history of state involvement in, and support of, religion during the pre-Revolutionary period and concluded:

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." 330 U. S., at 11 (emphasis supplied).

school" providing only that it is neither more than \$30 or \$40 per pupil nor more than 50% of the comparable public school expenditures.²⁴ Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In *Earley v. DeCenso*, the companion case to *Lemon v. Kurtzman*, *supra*, the Court struck down a Rhode Island law authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's annual salary. Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating "their religious beliefs from their secular educational responsibilities." 403 U. S., at 619.

"The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assump-

²⁴ The pertinent section reads as follows:

"In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. *In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.*" N. Y. Educ. Law, Art. 12, § 551 (McKinney Supp. 1972) (emphasis supplied).

tion that secular teachers under religious discipline can avoid conflicts. The State *must be certain, given the Religion Clauses*, that subsidized teachers do not inculcate religion" *Ibid.* (Emphasis supplied.)³⁵

Nor could the State of Rhode Island have prevailed by simply relying on the assumption that, whatever a secular teacher's inabilities to refrain from mixing the religious with the secular, he would surely devote at least 15% of his efforts to purely secular education, thus exhausting the state grant. It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny. See also *Tilton v. Richardson*, *supra*.³⁶

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian

³⁵ Elsewhere in the opinion, the Court emphasized the necessity for the States of Rhode Island and Pennsylvania to assure, through careful regulation, the secularity of their grants:

"The two legislatures . . . have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses." 403 U. S., at 613.

³⁶ In *Tilton*, federal construction grants were limited to paying 50% of the cost of erecting any secular facility. In striking from the law the 20-year limitation, the Court was concerned lest any federally-financed facility be used for religious purposes at any time. It was plainly not concerned only that at least 50% of the facility, or 50% of its life, be devoted to secular activities. Had this been the test there can be little doubt that the 20-year restriction would have been adequate.

schools. We have no occasion, therefore, to consider the further question whether those provisions as presently written would also fail to survive scrutiny under the administrative entanglement aspect of the three-part test because assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State, *Lemon v. Kurtzman*, *supra*.

B

New York's tuition reimbursement program also fails the "effect" test, for much the same reasons that govern its maintenance and repair grants. The state program is designed to allow direct, unrestricted grants of \$50 to \$100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools. To qualify, a parent must have earned less than \$5,000 in taxable income and must present a receipted tuition bill from a nonpublic school, the bulk of which are concededly sectarian in orientation.

There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in *Everson*:

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U. S., at 16.

The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution.³⁷ It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents: As noted above, in *Everson* parents were reimbursed for bus fares paid to send children to parochial schools, and in *Allen* textbooks were loaned directly to the children. But those decisions make clear that, far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.

In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. 330 U. S., at 17-18. Such services,

³⁷ In addition to *Everson* and *Allen*, THE CHIEF JUSTICE in his dissenting opinion relies on *Quick Bear v. Leupp*, 210 U. S. 50 (1908), for the proposition that "government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Post*, at 4. *Quick Bear*, however, did not involve the expenditure of tax-raised moneys to support sectarian schools. The funds that were utilized by the Indians to provide sectarian education were treaty and trust funds which the Court emphasized belonged to the Indians as payment for the cession of Indian land and other rights. *Id.*, at 80-81. It was their money and the Court held that for Congress to have prohibited them from expending their own money to acquire a religious education would have constituted a prohibition of the free exercise of religion. *Id.*, at 82. The present case is quite unlike *Quick Bear* since that case did not involve the distribution of public funds, directly or indirectly, to compensate parents who send their children to religious schools

provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," *id.*, at 18, that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." 392 U. S., at 244-245.³⁸

³⁸ *Allen* and *Everson* differ from the present case in a second important respect. In both cases the class of beneficiaries included *all* school children, those in public as well as those in private schools. See also *Tilton v. Richardson*, *supra*, in which federal aid was made available to *all* institutions of higher learning, and *Walz v. Tax Commission*, *supra*, in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions. We do not agree with the suggestion in the dissent of THE CHIEF JUSTICE that tuition grants are an analogous endeavor to provide comparable benefits to all parents of school children whether enrolled in public or nonpublic schools. *Post*, at 5-6. The grants to parents of private school children are given in addition to right that they have to send their children to public schools "totally at state expense." And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause.

Because of the manner in which we have resolved the tuition-grant issue, we need not decide whether the significantly religious character

The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." *Lemon v. Kurtzman*, *supra*, at 613. Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.³⁹

Mr. Justice Black, dissenting in *Allen*, warned that,

"[i]t requires no prophet to foresee that on the argument used to support this law others could be up-

of the statute's beneficiaries might differentiate the present case from a case involving some form of public assistance (*e. g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Wolman v. Esseez*, 342 F. Supp. 399, 412-413 (SD Ohio 1972), *aff'd*, 409 U. S. 808 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," 38 U. S. C. § 1651, impermissibly advance religion in violation of the Establishment Clause. See also n. 32, *supra*.

³⁹ Appellees, focusing on the term "principal or primary effect" which this Court has utilized in expressing the second prong of the three-part test, *e. g.*, *Lemon v. Kurtzman*, *supra*, at 612, have argued that the Court must decide in this case whether the "primary" effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. MR. JUSTICE WHITTAKER's dissenting opinion, *post*, at —, similarly suggests that the Court today fails to make this "ultimate judgment." We do not think

held providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay

that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In *McGowan v. Maryland*, *supra*, Sunday Closing Laws were upheld not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests. Instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a "remote and incidental" effect advantageous to religious institutions. *Id.*, at 450. See also *Gallagher v. Crown Kasher Super Market*, 366 U. S. 617, 630 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U. S. 582, 598 (1961). Likewise, in *Schempp* the school authorities argued that Bible-reading and other religious recitations in public schools served, primarily, secular purposes, including "the promotion of moral values, the contradiction to the material trends of the times, and the perpetuation of our institutions and the teaching of literature." 374 U. S., at 23. Yet, without discrediting these ends and without determining whether they took precedence over the direct religious benefit, the Court held such exercises incompatible with the Establishment Clause. See also 374 U. S., at 278-281 (BRENNAN, J., concurring). Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the Court found the mere possibility that a federally-financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "in part have the effect of advancing religion." 403 U. S., at 683 (emphasis supplied).

It may assist in providing an historical perspective to recall that the argument here is not a new one. The Preamble to Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion, which would have required Virginians to pay taxes to support religious teachers and which became the focal point of Madison's Memorial and Remonstrance, see n. 28, *supra*, contained the following listing of secular purposes:

"The general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their views, and preserve the

the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the government to pick up all the bills for the religious schools." 392 U. S., at 253.

His fears regarding religious buildings and religious teachers have not come to pass, *Tilton v. Richardson*, *supra*; *Lemon v. Kurtzman*, *supra*, and insofar as tuition grants constitute a means of "pick[ing] up . . . the bills for the religious schools," neither has his greatest-fear materialized. But the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court abundantly support the wisdom of Justice Black's prophecy.

Although we think it clear, for the reasons above stated, that New York's tuition grant program fares no better under the "effect" test than its maintenance and repair program, in view of the novelty of the question we will address briefly the subsidiary arguments made by the state officials and intervenors in its defense.

First, it has been suggested that it is of controlling significance that New York's program calls for *reimbursement* for tuition already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payment by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. There is no element of coercion attached to the reimbursement, and no assur-

peace of society" *Everson v. Board of Education*, 330 U. S., at 72 (Supplemental Appendix to dissent of Rutledge, J.).

Such secular objectives, no matter how desirable and irrespective whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify such a direct and substantial advancement of religion.

ance that the money will eventually end up in the hands of religious schools. The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause. In *School District of Abington Township v. Schempp*, *supra*, it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument, noting that while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause. *Id.*, at 222-223. MR. JUSTICE BRENNAN's concurring views reiterated the Court's conclusion:

"Thus the short, and for me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims. . . ." *Id.*, at 288.

A similar inquiry governs here: if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions.⁴⁰ Whether the grant is labeled a reimbursement, a reward or a subsidy, its substantive impact is still the same. In sum, we agree with the conclusion of the District Court that "[w]hether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance." 350 F. Supp., at 668.

⁴⁰ The forms of aid involved in *Everson*, *Earley v. DiCenso*, and *Lemon*, were all given as "reimbursement" yet not one line in any of those cases suggests that this factor was of any constitutional significance.

Second, the Majority Leader and President pro tem of the State Senate argues that it is significant here that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious school's total expenses. The New York statute limits reimbursement to 50% of any parent's actual outlay. Additionally, intervenor estimates that only 30% of the total cost of nonpublic education is covered by tuition payments, with the remaining coming from "voluntary contributions, endowments and the like."⁴¹ On the basis of these two statistics, appellee reasons that the "maximum tuition reimbursement by the State is thus only 15% of the educational costs in the nonpublic schools."⁴² And, "since compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical guarantee of neutrality."⁴³ It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs, *ante*, at 19-21, and it can fare no better here. Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools.⁴⁴ Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and "entanglement."

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to

⁴¹ Brief of Appellee Warren M. Anderson, at 25.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ None of the three dissenting opinions filed today purports to rely on any such statistical assurances of secularity. Indeed, under the rationale of those opinions, it is difficult to perceive any limitations on the amount of state aid that would be approved in the form of tuition grants.

promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment "is diminished or even denied."⁴⁵ It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, e. g., *Everson v. Board of Education*, *supra*; *Walz v. Tax Commission*, *supra*, and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion.⁴⁶ In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, *Everson v. Board of Education*, *supra*, at 18 (Jackson, J., dissenting), for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," *ibid.*, and notwithstanding the "high social importance" of the State's purposes, *Wisconsin v. Yoder*, 406 U. S. 205, 214

⁴⁵ N. Y. Educ. Law, Art. 12-A, § 559 (2) (McKinney Supp. 1972) (legislative finding supporting tuition reimbursement).

⁴⁶ "[T]he basic purpose of these provisions . . . is to insure that no religion is sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Commission*, *supra*, at 669.

(1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanté.

C

Sections 3, 4, and 5 establish a system for providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable debate over what label best fits the New York law. Appellants insist that the law is, in effect, one establishing a system of tax "credits." The State and the intervenors reject that characterization and would label it, instead, a system of income tax "modifications." The Solicitor General, in an *amicus curiae* brief filed in this Court, has referred throughout to the New York law as one authorizing tax "deductions." The District Court majority found that the aid was "in effect a tax credit," 350 F. Supp., at 672 (emphasis in original). Because of the peculiar nature of the benefit allowed, it is difficult to adopt any single traditional label lifted from the law of income taxation. It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income, prior to computation of the tax due. Its effect, as the District Court concluded, is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax "forgiveness" in exchange for performing a specific act which the State desires to encourage—the usual attribute of a tax credit. We see no reason to select one label over the other, as the constitutionality of this hybrid benefit does not turn in any event on the label we accord it. As MR. CHIEF JUSTICE BURGER's opinion for the Court in *Lemon v. Kurtzman*, *supra*, at 614, notes, constitutional analysis is not a "legalistic minuet in which pre-

cise rules and forms govern." Instead we must "examine the form of the relationship for the light that it casts on the substance."

These sections allow parents of children attending non-public elementary and secondary schools to subtract from adjusted gross income a specified amount if they do not receive a tuition reimbursement under § 2, and if they have an adjusted gross income of less than \$25,000. The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute.⁴⁷ The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. Thus, a parent who earns less than \$5,000 is entitled to a tuition reimbursement of \$50 if he has one child attending an elementary, nonpublic school, while a parent who earns more (but less than \$9,000) is entitled to have a precisely equal amount taken off his tax bill.⁴⁸ Additionally, a taxpayer's benefit under these sections is unrelated to, and not reduced by, any deductions to which he may be entitled for charitable contributions to religious institutions.⁴⁹

In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program re-

⁴⁷ See n. 18, *supra*.

⁴⁸ The estimated-benefit table is reprinted in n. 19, *supra*.

⁴⁹ Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the "neutrality" test in *Walz*.

ceives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." 350 F. Supp., at 675.

Appellees defend the tax portion of New York's legislative package on two grounds. First, they contend that it is of controlling significance that the grants or credits are directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements and rests on the same reading of the same precedents of this Court, primarily *Everson* and *Allen*. Our treatment of this issue in Part IIB, *supra*, at 22-26, is applicable here and requires rejection of this claim.⁵⁰ Second, appellees place their strongest reliance on *Walz v. Tax Commission*, *supra*, in which New York's property tax exemption for religious organizations was upheld. We think that *Walz* provides no support for appellees' position. Indeed, its rationale plainly compels the conclusion that New York's tax package violates the Establishment Clause.

Tax exemptions for church property enjoyed an apparently universal approval in this country both before

⁵⁰ Appellants conceded in their brief that "should the Court decide that Section 2 of the Act does not violate the Establishment Clause, we are unable to see how it could hold otherwise in respect to Sections 3, 4 and 5." Brief of Appellants, at 42-43. We agree that, under the facts of this case, the two are legally inseparable and that the affirmative of appellants' statement is also true, i. e., if § 2 does violate the Establishment Clause so, too, do the sections conferring tax benefits.

and after the adoption of the First Amendment. The Court in *Walz* surveyed the history of tax exemptions and found that each of the 50 States has long provided for tax exemptions for places of worship, that Congress has exempted religious organizations from taxation for over three-quarters of a century, and that congressional enactments in 1802, 1813, and 1870 specifically exempted church property from taxation. In sum, the Court concluded that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally." *Id.*, at 676-677.⁵¹ We know of no historical precedent for New York's recently promulgated tax relief program. Indeed, it seems clear that tax benefits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such non-public institutions and designed, albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court. See *Kosydar v. Wolman*, — F. Supp. — (SD Ohio 1972), *aff'd*, — U. S. — (1973).

But historical acceptance without more would not alone have sufficed, as "no one acquires a vested or protected right in violation of the Constitution by long use." 397 U. S., at 678. It was the reason underlying that long history of tolerance of tax exemptions for religion that proved controlling. A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion. Yet governments have not always pursued such a course, and

⁵¹ The separate opinions of Mr. Justice Harlan and Mr. Justice BRENNAN also emphasize the historical acceptance of tax-exempt status for religious institutions. See 397 U. S., at 680, 694.

oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was regarded as a form of "hostility" toward religion, "exemption constitute[d] a reasonable and balanced attempt to guard against those dangers." *Id.*, at 673. Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

Apart from its historical foundations, *Walz* is a product of the same dilemma and inherent tension found in most government-aid-to-religion controversies. To be sure, the exemption of church property from taxation conferred a benefit, albeit an indirect and incidental one. Yet that "aid" was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State. "The exemption," the Court emphasized, "tends to complement and reinforce the desired separation insulating each from the other." *Id.*, at 676. Furthermore, "[e]limination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.*, at 674. The granting of the tax benefits under the New York statute, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State.

One further difference between tax exemptions for church property and tax benefits for parents should be noted. The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predomi-

nantly of religious institutions. Instead the exemption covered all property devoted to religious, educational or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor.⁵²

In conclusion, we find the *Walz* analogy unpersuasive, and in light of the practical similarity between New York's tax and tuition reimbursement programs, we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.

III

Because we have found that the challenged sections have the impermissible effect of advancing religion, we need not consider whether such aid would result in entanglement of the State with religion in the sense of "[a] comprehensive, discriminating, and continuing state surveillance." *Lemon v. Kurtzman*, 403 U. S., at 619. But the importance of the competing societal interests implicated in this case prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

Few would question most of the legislative findings supporting this statute. We recognized in *Board of Edu-*

⁵² See also n. 38, *supra*.

cation v. *Allen*, 392 U. S., at 247, that "private education has played and is playing a significant and valuable role in raising levels of knowledge, competency, and experience," and certainly private parochial schools have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided primarily to afford low-income families the option of determining where their children are to be educated is most appealing.⁵³ There is no doubt that the private schools are confronted with increasingly grave fiscal problems, that resolving these problems by increasing tuition charges forces parents to turn to the public schools, and that this in turn—as the present legislation recognizes—exacerbates the problems of public education at the same time that it weakens support for the parochial schools.

These, in briefest summary, are the underlying reasons for the New York legislation and for similar legislation in other States. They are substantial reasons. Yet they must be weighed against the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State and which have been regarded from the beginning as among the most cherished features of our constitutional system.

One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program. As Mr. Justice Black's opinion in *Everson v. Board of Education*, *supra*, emphasizes, competition among religious sects for political and religious supremacy

⁵³ As noted in the opinion below: "This [case] is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their right to the free exercise of religion. The other group, equally dedicated, believes that encroachment of government in aid of religion is as dangerous to the secular state as encroachment of government to restrict religion would be to its free exercise." 350 F. Supp., at 660.

has occasioned considerable civil strife, "generated in large part" by competing efforts to gain or maintain the support of government. *Id.*, at 8-9. As Mr. Justice Harlan put it, "[w]hat is at stake as a matter of policy in Establishment Clause cases is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz v. Tax Commission*, 397 U. S., at 694 (concurring opinion).

The Court recently addressed this issue specifically and fully in *Lemon v. Kurtzman*. After describing the political activity and bitter differences likely to result from the state programs there involved, the Court said:

"The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow." 403 U. S., at 623.²⁴

The language of the Court applies with peculiar force to the New York statute now before us. Section 1 (grants for maintenance) and § 2 (tuition grants) will require continuing annual appropriations. Sections 3, 4, and 5 (income tax relief) will not necessarily require annual re-examination, but the pressure for frequent enlargement of the relief is predictable. All three of

²⁴ The Court in *Lemon* further emphasized that political division along religious lines is to be contrasted with the political diversity expected in a democratic society: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969)." 403 U. S., at 622.

these programs start out at modest levels: the maintenance grant is not to exceed \$40 per pupil per year in approved schools; the tuition grant provides parents not more than \$50 a year for each child in the first eight grades and \$100 for each child in the high school grades; and the tax benefit, though more difficult to compute, is equally modest. But we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases.⁵⁵ Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases.⁵⁶ In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for serious divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by

⁵⁵ As some 20% of the total school population in New York attends private and parochial schools, the constituent base supporting these programs is not insignificant.

⁵⁶ The self-perpetuating tendencies of any form of government aid to religion have been a matter of concern running throughout our Establishment Clause cases. In *Schempp*, the Court emphasized that it was "no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment," for what today is a "trickling stream may be a torrent tomorrow." 374 U. S., at 225. See also *Lemon v. Kurtzman*, *supra*, at 624-625. But, to borrow the words from Mr. Justice Rutledge's forceful dissent in *Everson*, it is not alone the potential expandability of state tax aid that renders such aid invalid. Not even "three pence" could be assessed: "Not the amount but 'the principle of assessment was wrong.'" 330 U. S., at 39-40 (quoting from Madison's Memorial and Remonstrance).

40 COMMITTEE FOR PUBLIC EDUCATION v. NYQUIST

the decisions of this Court, it is certainly a "warning signal" not to be ignored. *Id.*, at 625.

Our examination of New York's aid provisions, in light of all relevant considerations, compels the judgment that each, as written, has a "primary effect that advances religion" and offends the constitutional prohibition against laws "respecting the establishment of religion." We therefore affirm the three-judge court's holding as to §§ 1 and 2, and reverse as to §§ 3, 4, and 5.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 72-694, 72-753, 72-791, AND 72-929

Committee for Public Education
and Religious Liberty et al.,
Appellants,

72-694 v.

Ewald B. Nyquist, as Commis-
sioner of Education of the
State of New York et al.

Warren M. Anderson, as Majority
Leader and President pro tem
of the New York State
Senate, Appellant,

72-753 v.

Committee for Public Education
and Religious Liberty et al.

Ewald B. Nyquist, as Commis-
sioner of Education of the
State of New York
et al., Appellants,

72-791 v.

Committee for Public Education
and Religious Liberty et al.

Priscilla L. Cherry et al.,
Appellants,

72-929 v.

Committee for Public Education
and Religious Liberty et al.

On Appeals from the
United States Dis-
trict Court for the
Southern District of
New York.

[Caption continued on next page]

2 COMMITTEE FOR PUBLIC EDUCATION v. NYQUIST

Nos. 72-459 AND 72-620

Grace Sloan, as State Treasurer
of the Commonwealth of
Pennsylvania, et al.,
Appellants,

72-459 v.

Alton J. Lemon et al.

Henry E. Crouter, Appellant,

72-620 v.

Alton J. Lemon et al.

On Appeals from the
United States Dis-
trict Court for the
Eastern District of
Pennsylvania.

[June 25, 1973]

MR. CHIEF JUSTICE BURGER, joined in part by MR. JUSTICE WHITE, and joined by MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I join in that part of the Court's opinion in *Committee for Public Education and Religious Liberty v. Nyquist*, ante, which hold the New York "maintenance and repair" provision¹ unconstitutional under the Establishment Clause because it is a direct aid to religion. I disagree, however, with the Court's decisions in *Nyquist* and in *Sloan v. Lemon*, post, to strike down the New York and Pennsylvania tuition grant programs and the New York tax relief provisions.² I believe the Court's decisions on those statutory provisions ignore the teachings of *Everson v. Board of Education*, 330 U. S. 1 (1947),

¹ N. Y. Laws 1972, c. 414, § 1, amending New York Educ. Law, Art. 12, §§ 549-553 (McKinney 1972).

² Law of Pa., 1971, Act 92, 24 Pa. Stat. Ann. § 5701 et seq. (Supp. 1972); N. Y. Laws 1972, c. 414, § 2, amending N. Y. Educ. Law, Art. 12-A, §§ 559-563 (McKinney 1972); N. Y. Laws 1972, c. 414, §§ 3, 4, and 5, amending N. Y. Tax Law, §§ 612 (c), 612 (j) (McKinney 1972).

and *Board of Education v. Allen*, 392 U. S. 236 (1968), and fail to observe what I thought the Court had held in *Walz v. Tax Comm'n*, 397 U. S. 664 (1970). I therefore dissent as to those aspects of the two holdings.³

While there is no straight line running through our decisions interpreting the Establishment and Free Exercise clauses of the First Amendment, our cases do, it seems to me, lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, from enacting a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that "aid" religious instruction or worship. Thus, in *Everson* the Court held that a New Jersey township could reimburse *all* parents of school-age children for bus fares paid in transporting their children to school. Justice Black's opinion for the Court stated that the New Jersey "legislation, as applied, does no more than provide a general program to *help parents* get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U. S., at 18 (emphasis added).

Twenty-one years later, in *Board of Education v. Allen*, *supra*, the Court again upheld a state program that provided for direct aid to the parents of all school children including those in private schools. The statute there required "local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools [were] included." 392 U. S., at 238. Recognizing that *Everson* was the case "most nearly in point," the *Allen* Court

³ Mr. JUSTICE REHNQUIST's dissent, which I join, states the reasons why I believe the Court has gravely misrepresented the Court's opinion in *Walz*. In this opinion, I state additional reasons why I dissent from the Court's opinion in Parts IIB and IIC.

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interpreted *Everson* as holding that "the Establishment Clause does not prevent a state from extending the benefits of state laws to all citizens without regard to their religious affiliation" 392 U. S., at 241-242. Applying that principle to the statute before it, the *Allen* Court stated:

" . . . Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely *makes available to all children* the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. *Thus no funds or books are furnished to parochial schools, and the financial benefit is to the parents and children, not to schools.*" 392 U. S., at 243-244 (emphasis added).

The Court's opinions in both *Everson* and *Allen* recognized that the statutory programs at issue there may well have facilitated the decision of many parents to send their children to religious schools. *Everson v. Board of Education*, *supra*, 330 U. S., at 17-18; *Board of Education v. Allen*, *supra*, 392 U. S., at 242, 244. See *Norwood v. Harrison*, 413 U. S. —, — n. 6 (1973). Indeed, the Court in both cases specifically acknowledged that some children might not obtain religious instruction but for the benefits provided by the State. Notwithstanding, the Court held that such an indirect or incidental "benefit" to the religious institutions that sponsored parochial schools was not conclusive indicia of a "law respecting an establishment of religion."⁴

⁴ In *Lemon v. Kurtzman*, 403 U. S. 602 (1971), the Court specifically distinguished *Everson* and *Allen* on the ground that those cases involved aid to the parents and children and not to parochial schools:

"The Pennsylvania statute, moreover, has the further defect of

One other especially pertinent decision should be noted. In *Quick Bear v. Leupp*, 210 U. S. 50 (1908), the Court considered the question whether government aid to individuals who choose to use the benefits for sectarian purposes contravenes the Establishment Clause. There the Federal Government had set aside certain trust and treaty funds for the educational benefit of the members of the Sioux Indian Tribe. When some beneficiaries elected to attend religious schools, and the Government entered into payment contracts with the sectarian institutions, suit was brought to enjoin the disbursement of public money to those schools. Speaking of the constitutionality of such a program, the Court said:

"... But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the Government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof." 210 U. S., at 81-82.

The essence of all these decisions, I suggest, is that government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions. I say "generally" because it is obviously possible to conjure hypothetical statutes that constitute either a subterfuge for direct aid to religious institutions or a discriminatory enactment favoring religious over nonreligious activities. Thus, a State could not enact a statute providing for a \$10 gratuity to everyone who attended religious services weekly. Such a law

providing State financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both cases the Court was careful to point out that State aid was provided to the student and his parents—not to the church-related school...." *Id.*, at 621 (emphasis added).

would plainly be governmental sponsorship of religious activities; no statutory preamble expressing purely secular legislative motives would be persuasive. But at least where the state law is genuinely directed at enhancing the freedom of individuals to exercise a recognized right, even one involving both secular and religious consequences as is true of the right of parents to send their children to private schools, see *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), then the Establishment Clause no longer has a prohibitive effect.⁵

This fundamental principle which I see running through our prior decisions in this difficult and sensitive field of law, and which I believe governs the present cases, is premised more on experience and history than on logic. It is admittedly difficult to articulate the reasons why a State should be permitted to reimburse parents of private-school children—partially at least—to take into account the State's enormous savings in not having to provide schools for those children, when a State is not allowed to pay the same benefit directly to sectarian schools on a per-pupil basis. In either case, the private individual makes the ultimate decision that may indirectly benefit church sponsored schools; to that extent the state involvement with religion is substantially attenuated. The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families. This judgment reflects the caution with which we scrutinize any effort to give official support to religion and the tolerance with which

⁵ These considerations do not, however, justify similar state assistance accruing to the benefit of private schools having discriminatory policies. See *Norwood v. Harrison*, 413 U. S. —, — (1973).

we treat general welfare legislation. But, whatever its basis, that principle is established in our cases, from the early case of *Quick Bear* to the more recent holdings in *Everson* and *Allen*, and it ought to be followed here.

The tuition grant and tax relief programs now before us are, in my view, indistinguishable in principle, purpose and effect from the statutes in *Everson* and *Allen*. In the instant cases as in *Everson* and *Allen* the States have merely attempted to equalize the costs incurred by parents in obtaining an education for their children. The only discernible difference between the programs in *Everson* and *Allen* and these cases is in the method of the distribution of benefits: here the particular benefits of the Pennsylvania and New York statutes are given only to parents of private school children, while in *Everson* and *Allen* the statutory benefits were made available to parents of both public and private school children. But to regard that difference as constitutionally meaningful is to exalt form over substance. It is beyond dispute that the parents of public school children in New York and Pennsylvania presently receive the "benefit" of having their children educated totally at state expense; the statutes enacted in those States and at issue here merely attempt to equalize that "benefit" by giving to parents of private school children, in the form of dollars or tax deductions, what the parents of public school children receive in kind. It is no more than simple equity to grant partial relief to parents who support the public schools they do not use.

The Court appears to distinguish the Pennsylvania and New York statutes from *Everson* and *Allen* on the ground that here the state aid is not apportioned between the religious and secular activities of the sectarian schools attended by some recipients, while in *Everson* and *Allen* the state aid was purely secular in nature. But that distinction has not been followed in the past, see *Quick*

Bear v. Leupp, supra, and is not likely to be considered controlling in the future. There are at present many forms of government assistance to individuals that can be used to serve religious ends, such as social security benefits or "G. I. Bill" payments, which are not subject to nonreligious use restrictions. Yet, I certainly doubt that today's majority would hold those statutes unconstitutional under the Establishment Clause.

Since I am unable to discern in the Court's analysis of *Everson* and *Allen* any neutral principle to explain the result reached in these cases, I fear that the Court has in reality followed the unsupportable approach of measuring the "effect" of a law by the percentage of the recipients who choose to use the money for religious, rather than secular, education. Indeed, in discussing the New York tax credit provisions, the Court's opinion argues that "the tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools." *Ante*, at 36. While the opinion refrains from "intimating whether this factor alone might have controlling significance in another context in some future case," *ibid.*, similar references to this factor elsewhere in the Court's opinion suggest that it has been given considerable weight. Thus, the Court observes as to the New York tuition grant program: "Indeed, it is precisely the function of New York's law to provide assistance to private schools, *the great majority of which are sectarian.*" *Ante*, at 25 (emphasis added).

With all due respect, I submit that such a consideration is irrelevant to a constitutional determination of the "effect" of a statute. For purposes of constitutional adjudication of that issue, it should make no difference whether 5%, 20%, or 80% of the beneficiaries of an educational program of general application elect to utilize their benefits for religious purposes. The "primary effect" branch of our three-pronged test was never, at

least to my understanding, intended to vary with the number of churches benefitted by a statute under which state aid is distributed to private citizens.

Such a consideration, it is true, might be relevant in ascertaining whether the *primary legislative purpose* was to advance the cause of religion. But the Court has, and I think correctly, summarily dismissed the contention that either New York or Pennsylvania had an improper purpose in enacting these laws. The Court fully recognizes that the legislatures of New York and Pennsylvania have a legitimate interest in "promoting pluralism and diversity among . . . public and nonpublic schools," *Ante*, at 15, in assisting those who reduce the State's expenses in providing public education, and in protecting the already overburdened public school system against a massive influx of private school children. And in light of this Court's recognition of these secular legislative purposes, I fail to see any acceptable resolution to these cases except one favoring constitutionality.

I would therefore uphold these New York and Pennsylvania statutes. However sincere our collective protestations of the debt owed by the public generally to the parochial school systems, the wholesome diversity they engender will not survive on expressions of good will.

MR. JUSTICE WHITE joins this opinion insofar as it relates to the New York and Pennsylvania tuition grant statutes and the New York tax relief statute.

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY
JOHN H. COLEMAN
OF THE CITY OF BOSTON
IN TWO VOLUMES
VOL. I.
BOSTON: PUBLISHED BY
J. B. ALLEN, 1854.

The city of Boston, the largest and most important city in New England, has a history of more than two centuries. It was first settled in 1630 by a group of Puritan settlers from England, who came to the New World in search of religious freedom and a better life. The city grew rapidly, and by the mid-17th century it was one of the most important cities in the colonies. It was the site of the Boston Tea Party in 1773, and the center of the American Revolution. After the war, it became a major center of commerce and industry, and in the 19th century it was one of the most important cities in the world. Today, it is still one of the most important cities in the United States.

SUPREME COURT OF THE UNITED STATES

Nos. 72-694, 72-753, 72-791, AND 72-929

Committee for Public Education
and Religious Liberty et al.,
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72-694 v.

Ewald B. Nyquist, as Commis-
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State of New York et al.

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72-929 v.

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and Religious Liberty et al.

On Appeals from the
United States Dis-
trict Court for the
Southern District of
New York.

[Caption continued on next page]

2 COMMITTEE FOR PUBLIC EDUCATION v. NYQUIST

Nos. 72-459 AND 72-620

Grace Sloan, as State Treasurer
of the Commonwealth of
Pennsylvania, et al.,
Appellants,

72-459

v.

Alton J. Lemon et al.

Henry E. Crouter, Appellant,

72-620

v.

Alton J. Lemon et al.

On Appeals from the
United States Dis-
trict Court for the
Eastern District of
Pennsylvania.

[June 25, 1973]

MR. JUSTICE WHITE, joined in part by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, dissenting.

Each of the States regards the education of its young to be a critical matter, so much so that it compels school attendance and provides an educational system at public expense. Any otherwise qualified child is entitled to a free elementary and secondary school education, or at least an education that costs him very little as compared with its cost to the State.

This Court has held, however, that the Due Process Clause of the Constitution entitles parents to send their children to nonpublic schools, secular or sectarian, if those schools are sufficiently competent to educate the child in the necessary secular subjects. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). About 10% of the Nation's children, approximately 5.2 million students, now take this option and are not being educated in public schools at public expense. Under state law these children have a right to a free public education and it would not appear unreasonable if the State, relieved of the expense of educating a child in the public school, con-

tributed to the expense of his education elsewhere. The parents of such children pay taxes, including school taxes. They could receive in return a free education in the public schools. They prefer to send their children, as they have the right to do, to nonpublic schools that furnish the satisfactory equivalent of a public school education but also offer subjects or other assumed advantages not available in public schools. Constitutional considerations aside, it would be understandable if a State gave such parents a call on the public treasury up to the amount it would have cost the State to educate the child in public school, or to put it another way, up to the amount the parents save the State by not sending their children to public school.

In light of the Free Exercise Clause of the First Amendment, this would seem particularly the case where the parent desires his child to attend a school that offers not only secular subjects but religious training as well. A State should put no unnecessary obstacles in the way of religious training for the young. "When the State encourages religious instruction . . . it follows the best of our traditions." *Zorach v. Clauson*, 343 U. S. 306, 313-314 (1952); *Wals v. Tax Commission*, 397 U. S. 664, 676 (1970). Positing an obligation on the State to educate its children, which every State acknowledges, it should be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools rather than to insist that if parents want to provide their children with religious as well as secular education, the State will refuse to contribute anything to their secular training.

Historically the States of the Union have not furnished public aid for education in private schools. But in the last few years, as private education, particularly the parochial school system, has encountered financial difficulties, with many schools being closed and many more

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apparently headed in that direction, there has developed a variety of programs seeking to extend at least some aid to private educational institutions. Some States have provided only fringe benefits or auxiliary services. Others attempted more extensive efforts to keep the private school system alive. Some made direct arrangements with private and parochial schools for the purchase of secular educational services furnished by those schools.¹ Others provided tuition grants to parents sending their children to private schools, permitted dual enrollments or shared time arrangements or extended substantial tax benefits in some form.²

¹ This kind of program was adopted by Pennsylvania and Rhode Island and was declared invalid in *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

² Based on State Aid to Non-Public Schools, a publication of the Department of Special Projects, National Catholic Education Association, the following summarizes, as of February 1, 1973, the various types of aid to nonpublic schools available in the various States, exclusive of those types of support finally declared unconstitutional by this Court:

Direct Aid Programs:

Parental Grants or Reimbursement Schemes: 5 States (including New York and Pennsylvania).

Dual Enrollment (Shared Time): 9 States.

Tax Credits: 6 States (including New York).

Leasing of Non-Public School Facilities by Public School Systems: 4 States.

Educational Opportunities for Rural Students: 1 State (Alaska).

Innovative Programs: 1 State (Illinois).

Exemption from State Sales Tax for Educational and Janitorial Supplies: 1 State (North Dakota).

Auxiliary Services or Benefits:

Transportation: 24 States plus District of Columbia.

Textbooks and Instructional Materials: 14 States.

Health and Welfare Services (i. e., school physician, nurse, dental services, hygienist, psychologist, speech therapist, social worker, etc.): 15 States.

[Footnote 2 continued on p. 5]

The dimensions of the situation are not difficult to outline.³ The 5.2 million private elementary and secondary school students in 1972 attended some 3,200 non-sectarian private schools and some 18,000 schools that are church related. Twelve thousand of the latter were Roman Catholic schools and enrolled 4.37 million pupils or 83% of the total nonpublic school membership. Sixty-two percent of nonpublic school students are concentrated in eight industrialized, urbanized States: New York, Pennsylvania, Illinois, California, Ohio, New Jersey, Michigan, and Massachusetts.⁴ Eighty-three percent of the nonpublic school enrollment is to be found in large metropolitan areas. Nearly one out of five students in

Driver Education: 7 States (applies only to dually enrolled students in South Dakota).

Services for Educationally Disadvantaged Children, Educational Testing, and Miscellaneous (principally aid services for deaf, blind, handicapped, or retarded children; educational testing; remedial programs, etc.): 11 States.

School Lunches: 2 States (New York and Louisiana).

Released Time: 2 States (Michigan and South Dakota).

Vocational Education: 2 States (Ohio and California).

Central Purchasing of Supplies: 2 States (Oregon and Washington).

Participation of Lay Teachers in Non-Public Schools in Public School Teachers Retirement Fund Scheme: 1 State (North Dakota).

A total of 16 States now extend one or more types of direct aid. 33 States, including almost all of the foregoing 16, offer auxiliary services or benefits. At least 19 States have constitutional or statutory barriers to any kind of direct aid to parochial schools.

³ The data in this and the following paragraph of the text are taken from Final Report, President's Panel on Nonpublic Education, 1972, pp. 5-6, 15-19. See also Hearings on H. R. 16,141 and other pending proposals, Committee on Ways and Means, House of Representatives, 92d Cong., 2d Sess., pp. 118-119, 127-131.

⁴ Nonpublic enrollments in these States are as follows: New York, 789,110; Pennsylvania, 518,435; Illinois, 451,724; California, 398,981; Ohio, 339,435; New Jersey, 298,548; Michigan, 264,089; and Massachusetts, 205,011.

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each of the Nation's largest cities are enrolled in nonpublic schools.⁵

Nonpublic school enrollment has dropped at the rate of 6% per year for the past five years. Since 1965 nonpublic school enrollment has dropped 23%; the public schools show an increase of 12%. Projected to 1980, it is estimated that seven States (the eight mentioned in the text less Massachusetts) will lose 1,416,122 nonpublic school students. Whatever the reasons, there has been, and there probably will be, a movement to the public schools, with the prospect of substantial increases in public school budgets that are already under intense attack and with the States and cities that are primarily involved already facing severe financial crises. It is this prospect that has prompted some of these States to attempt, by a variety of devices, to save or slow the demise of the nonpublic school system, an educational resource that could deliver quality education at a cost to the

⁵ Enrollments in nonpublic schools in the country's 15 largest cities are as follows:

City	Nonpublic enrollment	Percentage of total
New York City	358,594	24.3
Chicago	208,174	27.3
Philadelphia	146,298	33.6
Detroit	58,228	16.5
Los Angeles	43,601	6.3
New Orleans	41,938	27.2
Cleveland	36,922	19.4
Pittsburgh	36,661	19.4
Buffalo	36,623	33.8
Boston	35,237	27.1
Baltimore	33,833	15.0
Cincinnati	32,653	27.4
Milwaukee	32,256	19.8
San Francisco	29,582	23.9
St. Paul	22,267	30.3

public substantially below the per pupil cost of the public schools.*

There are, then, the most profound reasons, in addition to those normally attending the question of the

* The direct aid programs for nonpublic schools available in the eight principally affected States listed in n. 4 are as follows:
New York

A. Full tuition and board for deaf and blind children educated at state-approved nonpublic schools.

B. Tuition (up to \$2,000) for handicapped children educated at nonpublic schools.

C. Teacher salary payments to nonpublic schools operated by incorporated orphan asylum societies.

D. Omnibus Education Act.

1. Health and safety grants for nonpublic schools qualifying under Title IV of the Higher Education Act of 1965 as serving areas with high concentrations of poverty families.

2. Tuition assistance grants for parents with taxable incomes under \$5,000.

3. Tax credit assistance for parents with incomes from \$9,000-\$25,000.

E. Mandated Services Act.

1. Reimbursement of nonpublic schools for costs of fulfilling state administrative requirements.
Pennsylvania

A. Dual enrollment.

B. Parent Reimbursement Act.

1. Reimbursement of parents for actual costs of nonpublic education of their children up to \$75 for elementary school students and \$150 for secondary school students.
Illinois

A. Grants to children from poverty families for actual costs of nonpublic education up to amount of state aid child would receive if attending public school.

B. Special grants for innovative programs.
California

A. Tax credit assistance for parents with incomes ranging to \$10,000. Maximum credit is \$125 per child per year in nonpublic school.

[Footnote 6 continued on p. 8]

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constitutionality of a state statute, for this Court to proceed with the utmost care in deciding these cases. It should not, absent a clear mandate in the Constitution, invalidate these New York and Pennsylvania statutes and thereby not only scuttle state efforts to hold off serious financial problems in their public schools but also make it more difficult, if not impossible, for parents to follow the dictates of their conscience and seek a religious as well as secular education for their children.

I am quite unreconciled to the Court's decision in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). I thought then, and I think now, that the Court's conclusion there

Ohio

A. Dual enrollment with respect to vocational training.

B. Tax credit assistance for parents of nonpublic school students up to \$90 per child per year.

New Jersey

No direct aid.

Michigan

A. Released time.

B. Dual enrollment.

Recent state constitutional amendment precludes all other forms of direct aid.

Massachusetts

Direct aid is barred by state constitutional provision.

As of February 1972, the estimated Catholic population in each of these eight States was as follows:

Estimated 1970 Population (in thousands)

	Total Population	Estimated Catholics	Catholic/Total
Massachusetts	5,241	2,947	56.2%
New Jersey	7,332	2,898	39.5%
New York	18,361	6,558	35.7%
Pennsylvania	11,871	3,658	30.8%
Illinois	10,751	3,455	32.1%
Michigan	9,433	2,383	25.3%
Ohio	10,612	2,265	21.3%
California	20,250	4,053	20.0%

Source: State Aid to Non-public Schools, see n. 2.

was not required by the First Amendment and is contrary to the long range interests of the country. I therefore have little difficulty in accepting the New York maintenance grant, which does not and could not, by its terms, approach the actual repair and maintenance cost incurred in connection with the secular education services performed for the State in parochial schools. But accepting *Lemon* and the invalidation of the New York maintenance grant, I would, with THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, sustain the New York and Pennsylvania tuition grant statutes and the New York tax credit provisions.

No one contends that he can discern from the sparse language of the Establishment Clause that a State is forbidden to aid religion in any manner whatsoever or, if it does not mean that, what kind of or how much aid is permissible. And one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations. In the end the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choice among many alternatives. But decision has been unavoidable; and, in choosing, the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.

The course of these decisions has made it clear that the First Amendment does not bar all state aid to religion, of whatever kind or extent. States do, and they may, furnish churches and parochial schools with police and fire protection as well as water and sewage facilities. Also, "all of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantee." *Walz v. Tax Commission*, 397 U. S. 664, 676 (1970). This is a multimillion-dollar

benefit to religious institutions, see DOUGLAS, J., dissenting, in *Walz, supra*, 397 U. S., at 714, but a benefit that this Court has held is wholly consistent with the First Amendment. Bus transportation may be furnished to students attending parochial schools as well as to those going to public schools. *Everson v. Board of Education*, 330 U. S. 1 (1947). So too the State may furnish school books to such students, *Board of Education v. Allen*, 392 U. S. 236 (1968), although in doing so they "relieve[d] those churches of an enormous aggregate cost for those books." *Walz, supra*, 397 U. S., at 671-672. A State may also become the owner of the property of a church-sponsored college and lease it back to the college, all with the purpose and effect of permitting revenue bonds issued in connection with the college's operation to be tax exempt and working a lower rate of interest and substantial savings to the sectarian institution. *Hunt v. McNair*, — U. S. —.

The Court thus has not barred all aid to religion or to religious institutions. Rather, it has attempted to devise a formula that would help identify the kind and degree of aid that is permitted or forbidden by the Establishment Clause. Until 1970, the test for compliance with the Clause was whether there "was a secular legislative purpose and primary effect that neither advances nor inhibits religion . . ."; given a secular purpose, what is "the primary effect of the enactment?" *Abington School District v. Schempp*, 374 U. S. 203, 222 (1963); *Board of Education v. Allen*, 392 U. S. 236, 243 (1968). In 1970, a third element surfaced—whether there is "an excessive government entanglement with religion." *Walz v. Tax Commission*, 397 U. S. 664, 674 (1970). That element was not fatal to real property tax exemptions for church property but proved to be the crucial element in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), where the Court struck down the efforts by the States of Pennsyl-

vania and Rhode Island to stave off financial disaster for their parochial school systems, the saving of which each of these States deemed important to the public interest. In accordance with one formula or the other, the laws in question furnished part of the cost incurred by private schools in furnishing secular education to substantial segments of the children in those States. Conceding a valid secular purpose and not reaching the question of primary effect, the Court concluded that the laws excessively, and therefore fatally, entangled the State with religion. What appeared to be an insoluble dilemma for the States, however, proved no insuperable barrier to the Federal Government in aiding sectarian institutions of higher learning by direct grants for specified facilities, *Tilton v. Richardson*, 403 U. S. 672 (1971). And *Hunt v. McNair*, decided this day, see *post* —, evidences the difficulty in perceiving when the State's involvement with religion passes the peril point.

But whatever may be the weight and contours of entanglement as a separate constitutional criterion, it is of remote relevance in the case before us with respect to the validity of tuition grants or tax credits involving or requiring no relationships whatsoever between the State and any church or any church school. So also the Court concedes the State's genuine secular purpose underlying these statutes. It therefore necessarily arrives at the remaining consideration in the three-fold test which is apparently accepted from prior cases: Whether the law in question has "a primary effect that neither advances nor inhibits religion." *Abington School District v. Schempp*, *supra*. While purporting to accept the standard stated in this manner, the Court strikes down the New York maintenance law, and for the same reason invalidates the tuition grants, because its "effect, inevitably, is to subsidize and advance the religious mission of sectarian schools." See *ante*, p. —. But the test is

one of "primary" effect not *any* effect. The Court makes no attempt at that ultimate judgment necessarily entailed by the standard heretofore fashioned in our cases. Indeed, the Court merely invokes the statement in *Everson v. Board of Education*, 330 U. S. 1, 16 (1947), that no tax can be levied "to support any religious activities" But admittedly there was no tax levied here for the *purpose* of supporting religious activities; and the Court appears to accept those cases, including *Tilton*, that inevitably involved aid of some sort or in some amount to the religious activities of parochial schools. In those cases the judgment was that as long as the aid to the school could fairly be characterized as supporting the secular educational functions of the school, whatever support to religion resulted from this direct, *Tilton v. Richardson*, *supra*, or indirect, *Everson v. School District*, *supra*; *Board of Education v. Allen*, *supra*; *Wald v. Tax Commission*, *supra*; *Hunt v. McNair*, — U. S. —, contribution to the school's overall budget was not violative of the primary effect test nor of the Establishment Clause.

There is no doubt here that Pennsylvania and New York have sought in the challenged laws to keep their parochial schools system alive and capable of providing adequate secular education to substantial numbers of students. This purpose satisfies the Court, even though to rescue schools that would otherwise fail will inevitably enable those schools to continue whatever religious functions they perform. By the same token, it seems to me, preserving the secular functions of these schools is the overriding consequence of these laws and the resulting, but incidental, benefit to religion should not invalidate them.

At the very least I would not strike down these statutes on their face. The Court's opinion emphasizes a par-

particular kind of parochial school, one restricted to students of particular religious beliefs and conditioning attendance on religious study. Concededly, there are many parochial schools that do not impose such restrictions. Where they do not, it is even more difficult for me to understand why the primary effect of these statutes is to advance religion. I do not think it is and therefore dissent from the Court's judgment invalidating the challenged New York and Pennsylvania statutes.

THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join this opinion insofar as it relates to the New York and Pennsylvania tuition grant statutes and the New York tax credit statute.

SUPREME COURT OF THE UNITED STATES

Nos. 72-694, 72-753, 72-791, AND 72-929

Committee for Public Education
and Religious Liberty et al.,
Appellants,

72-694 v.

Ewald B. Nyquist, as Commis-
sioner of Education of the
State of New York et al.

Warren M. Anderson, as Majority
Leader and President pro tem
of the New York State
Senate, Appellant,

72-753 v.

Committee for Public Education
and Religious Liberty et al.

Ewald B. Nyquist, as Commis-
sioner of Education of the
State of New York
et al., Appellants,

72-791 v.

Committee for Public Education
and Religious Liberty et al.

Priscilla L. Cherry et al.,
Appellants,

72-929 v.

Committee for Public Education
and Religious Liberty et al.

On Appeals from the
United States Dis-
trict Court for the
Southern District of
New York.

[June 25, 1973]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE concur, dissenting in part.

Differences of opinion are undoubtedly to be expected when the Court turns to the task of interpreting the meaning of the Religious Clauses of the First Amendment, since our previous cases arising under these clauses,

2 COMMITTEE FOR PUBLIC EDUCATION v. NYQUIST

as the Court notes, "have presented some of the most perplexing questions to come before the Court." *Ante*, p. 3. I dissent from those portions of the Court's opinion which strike down §§ 2 through 5, c. 414, 1972 N. Y. Laws. Section 2, *supra*, grants limited state aid to low-income parents sending their children to nonpublic schools and §§ 3 through 5, *supra*, make roughly comparable benefits available to middle-income parents through the use of tax deductions. I find both the Court's reasoning and result all but impossible to reconcile with *Walz v. Tax Commission*, 397 U. S. 664 (1970), decided only three years ago, and with *Board of Education v. Allen*, 392 U. S. 236 (1968), and *Everson v. Board of Education*, 330 U. S. 1 (1947).

I

The opinions in *Walz, supra*, make it clear that tax deductions and exemptions, even when directed to religious institutions, occupy quite a different constitutional status under the Religion Clauses of the First Amendment than do outright grants to such institutions. CHIEF JUSTICE BURGER, speaking for the Court in *Walz*, said:

"The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the State. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the State or put employees 'on the public payroll.' *There is no genuine nexus between tax exemption and establishment of religion.*" 397 U. S., at 675 (emphasis added).

MR. JUSTICE BRENNAN in his concurring opinion amplified the distinction between tax benefits and direct payments in these words:

"Tax exemptions and general subsidies, however,

are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. . . . Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy." 397 U. S. 680, 690-691 (footnotes omitted).

Here the effect of the tax benefit is trebly attenuated as compared with the outright exemption considered in *Walz*. There the result was a complete forgiveness of taxes, while here the result is merely a reduction in taxes. There the ultimate benefit was available to an actual house of worship, while here even the ultimate benefit redounds only to a religiously sponsored school. There the churches themselves received the direct reduction in the tax bill, while here it is only the parents of the children who were sent to religiously sponsored schools who receive the direct benefit.

The Court seeks to avoid the controlling effect of *Walz* by comparing its historical background to the relative recency of the challenged deduction plan; by noting that in its historical context, a property tax exemption is religiously neutral, whereas the educational cost deduction here is not; and by finding no substantive difference between a direct reimbursement from the State to parents and the State's abstention from collecting the full tax bill which the parents would otherwise have had to pay.

While it is true that the Court reached its result in *Walz* in part by examining the unbroken history of property tax exemptions for religious organizations in this country, there is no suggestion in the opinion that only those particular tax exemption schemes that have roots

in pre-Revolutionary days are sustainable against an Establishment Clause challenge. As the Court notes in its opinion, historical acceptance alone would not have served to validate the tax exemption upheld in *Walz* because "no one acquires a vested or protected right in violation of the Constitution by long use." *Ante*, p. 33, citing 397 U. S., at 678.

But what the Court gives in the form of *dicta* with one hand, it takes away in the form of its holding with the other. For if long established use of a particular tax exemption scheme leads to a holding that the scheme is constitutional, that holding should extend equally to newly devised tax benefit plans which are indistinguishable in principle from those long established.

The Court's statement that "special tax benefits, however, cannot be squared with the principle of neutrality established by decisions of this Court," *ante*, p. 34, and that "insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions," *ante*, p. 34, are impossible to reconcile with *Walz*. Who can doubt that the tax exemptions which that case upheld were every bit as much of a "special tax benefit" as the New York tax deduction plan here, or that the benefits resulting from the exemption in *Walz* had every bit as much tendency to "aid and advance . . . religious institutions" as did New York's plan here?

The Court nonetheless declares that what has been authorized by the legislature is not a true deduction and in substance provides an incentive for parents to send their children to sectarian schools because the amount deductible from adjusted gross income bears no relationship to amounts actually expended for nonpublic education. Support for its notion that the authorization is

essentially the same as a tax credit or a reimbursement is drawn from the fact that the net benefit under the reimbursement plan established in § 2 of c. 414 is equal to the net tax savings for those at the lower-income end of the tax deduction plan.¹ But the deduction here allowed is analytically no different from any other flat-rate exemptions or deductions currently in use in both federal and state tax systems. Surely neither the standard deduction,² usable by those taxpayers who do not itemize their deductions, nor personal³ or dependency exemptions,⁴ for example, bears any relationship whatsoever to the actual expenses accrued in earning any of them. Yet none of these could properly be called a reimbursement from the State. And it would take more of a record⁵ than is present in this case to prove the

¹ Section 2, c. 414, 1972 N. Y. Laws, provided for flat tuition grants of \$50 per year for parents who had children in nonpublic primary schools and \$100 per year for parents whose children were attending nonpublic secondary schools. Tuition reimbursements were limited, however, to 50% of amounts actually expended, and only those parents whose adjusted gross incomes were less than \$5,000 were eligible.

A table of estimated benefits from the tax modifications contained in §§ 4 and 5 was submitted to the legislators. That table indicated that taxpayers whose adjusted gross income fell between \$5,000 and \$9,000 received an estimated \$50 per dependent attending nonpublic schools. The number of allowable deductions was limited to three.

² See, e. g., 26 U. S. C. § 141 *et seq.* Currently, the maximum standard deduction allowable under the income tax laws is \$2,000, regardless of a taxpayer's income or the number of his dependents. § 141 (b). Similarly, there is a minimum low income allowance of \$1,000 for those who do not qualify for the percentage standard deduction. § 141 (c). Between these extremes, there is a standard deduction of 15% of adjusted gross income, § 141 (b).

³ See, e. g., 26 U. S. C. § 151 *et seq.*

⁴ 26 U. S. C. § 151 (e).

⁵ There was no discovery or other development of a factual record in this case. There is, therefore, no indication as to how much

possibility of a slightly lower aggregate tax bill accorded New York taxpayers who send their dependents to nonpublic schools provides any more incentive to send children to such schools than personal exemptions provide for getting married or having children. That parents might incidentally find it easier to send children to nonpublic schools has not heretofore been held to require invalidation of a state statute. *Board of Education v. Allen*, *supra*; *Everson v. Board of Education*, *supra*.

The sole difference between the flat-rate exemptions currently in widespread use and the deduction established in §§ 4 and 5 is that the latter provides a regressive benefit. This legislative judgment, however, as to the appropriate spread of the expense of public and nonpublic education is consonant with the State's concern that those at the lower end of the income brackets are less able to exercise freely their consciences by sending their children to nonpublic schools, and is surely consistent with the "benevolent neutrality" we try to uphold in reconciling the tension between the Free Exercise and Establishment Clauses. *Walz*, *supra*, at 669. Regardless of what the Court chooses to call the New York plan, it is still abstention from taxation, and that abstention stands on no different theoretical footing, in terms of running afoul the Establishment Clause, from any other deduction or exemption currently allowable for religious contributions or activities.* The invalidation of the New York plan is directly contrary to this Court's pronouncements in *Walz*, *supra*.

tuition payments in nonpublic schools average and whether the relatively minor benefits under the plan could realistically be said to provide any incentive. And yet the Court has stricken this plan arguing that its inevitable result is to encourage parents to send children to religious schools.

* See, e. g., 26 U. S. C. §§ 170, 2055, 2522.

II

In striking down both plans, the Court places controlling weight on the fact that the State has not purported to restrict to secular purposes either the reimbursements or the money which it has not taxed. This factor assertedly serves to distinguish *Board of Education v. Allen, supra*, and *Everson v. Board of Education, supra*, and compels the result that inevitably the primary effect of the plans is to provide financial support for sectarian schools.

In *Everson, supra*, the Court sustained the constitutional validity of a New Jersey statute and resulting school board regulation that provided, in part, for the direct reimbursement to parents of children attending sectarian schools of amounts expended in providing public transportation to and from such schools. Expressly noting that the challenged regulation undoubtedly helped children to get to church schools and that:

"There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the state . . .," *id.*, at 17,

the majority in an opinion written by Mr. Justice Black held that the state scheme did not violate the Establishment Clause. And it was emphasized that the State in that case contributed no money to the schools, *id.*, at 18; rather it did no more than effectuate a secular purpose—the transportation of children safely and expeditiously to and from accredited schools.

Similarly in *Allen, supra*, a state program whereby secular textbooks were loaned to all children in accredited

schools was approved as consistent with the Establishment Clause, even though the Court recognized that free books made it more likely that some children would choose to attend a sectarian school. *Id.*, at 244. It was again emphasized that "no funds or books [were] furnished to parochial schools," and that therefore "the financial benefit [was] to parents and children, not to schools." *Id.*, at 243-244. This factor was considered crucial in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), where the Court stated, at 621:

"The Pennsylvania statute, moreover, has the further defect of providing State financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both cases the Court was careful to point out that State aid was provided to the student and his parents—not to the church-related school. . . ." (Emphasis added.)

Both *Everson* and *Allen* gave significant recognition to the "benevolent neutrality" concept, and the Court was guided by the fact that any effect from state aid to parents has a necessarily attenuated impact on religious institutions when compared to direct aid to such institutions.

The reimbursement and tax benefit plans today struck down, no less than the plans in *Everson* and *Allen*, are consistent with the principle of neutrality. New York has recognized that parents who are sending their children to nonpublic schools are rendering the State a service by decreasing the costs of public education and by physically relieving an already overburdened public school system. Such parents are nonetheless compelled to support public school services unused by them and to pay for their own children's education. Rather than offering

"an incentive to send their children to sectarian schools," *ante*, p. 27, as the majority suggests, New York is effectuating the secular purpose of the equalization of the costs of educating New York children that are borne by parents who send their children to nonpublic schools. As in *Everson* and *Allen*, the impact, if any, on religious education from the aid granted is significantly diminished by the fact that the benefits go to the parents rather than to the institutions.

The increasing difficulties faced by private schools in our country are no reason at all for this Court to readjust the admittedly rough hewn limits on governmental involvement with religion which are found in the First and Fourteenth Amendments. But quite understandably these difficulties can be expected to lead to efforts on the part of those who wish to keep alive pluralism in education to obtain through legislative channels forms of permissible public assistance which were not thought necessary a generation ago. Within the limits permitted by the Constitution, these decisions are quite rightly hammered out on the legislative anvil. If the Constitution does indeed allow for play in the legislative joints, *Walz, supra*, at 669, the Court must distinguish between a new exercise of power within constitutional limits and an exercise of legislative power which transgresses those limits. I believe the Court has failed to make that distinction here, and I therefore dissent.